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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 649

R. C. TWAY COAL COMPANY, KENTUCKY CARDINAL COAL CORPORATION, HARLAN-WALLINS COAL CORPORATION, ET AL., PETITIONERS,

vs.

SELDEN R. GLENN, INDIVIDUALLY, AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 20, 1935.

CERTIORARI GRANTED DECEMBER 23, 1935.

SUPREME COURT OF THE UNITED STATES

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DISTRICT COURT OF THE UNITED STATES

WESTERN DISTRICT OF KENTUCKY.

TRANSCRIPT OF RECORD.

Proceedings in the District Court of the United States For the Western District of Kentucky, at a Regular Term Begun and Held at the Federal Court Hall in the City of Louisville, Kentucky, on March 11, A. D. 1935.

R. C. Tway Coal Company, et al., - - - Plaintiffs,

vs.

Selden R. Glenn, Individually and as Collector of Internal Revenue for the District of Kentucky, - - - - - - - - Defendant.

Be it remembered, that heretofore, to-wit on September 10, 1935, came the plaintiffs, by their counsel, Woodward, Dawson & Hobson, and tendered their Bill in Equity, which was filed and which is in words and figures as follows:

BILL IN EQUITY—Filed September 10, 1935.

1.

The plaintiffs state that they are each miners and producers of bituminous coal, and that their respective mines are located in Harlan County, in the Eastern District of Kentucky. The plaintiffs, R. C. Tway Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Green-Silvers Coal Corporation and Kentucky King Coal Company, are each corpora-

tions organized under the laws of the Commonwealth of Kentucky and are each citizens of that State. The plaintiffs, Kentucky Cardinal Coal Corporation, and Mary Helen Coal Corporation, are each corporations organized under the laws of the Commonwealth of Virginia and are citizens of that State. The plaintiffs, Harlan-Wallins Coal Corporation and the P. V. & K. Coal Company, are each corporations organized under the laws of the State of Delaware and are each citizens of that State, and the plaintiff, Creech Coal Company, is a corporation organized under the laws of the State of Arizona and is a citizen of that State. Plaintiffs state that they are each, as corporations, authorized to contract and to be contracted with and to sue in their respective corporate names, and that they are each authorized by their articles of incorporation to engage in the business of mining and producing bituminous coal and to sell the coal produced by them.

2.

The defendant, Selden R. Glenn, is a citizen of the Commonwealth of Kentucky, residing in Louisville, Jefferson County, in the Western District of Kentucky, and is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Kentucky, and as such Collector it is his duty to collect in the District of Kentucky all taxes, assessments and levies made or attempted to be made by the United States of America which are collectible in Kentucky through the Internal Revenue Department, including the so-called taxes and penalties hereinafter referred to.

3.

This is a suit in equity of a civil nature, arising under the Constitution and laws of the United States, as will be hereinafter more fully set out, and it presents and involves an actual controversy between each of the plaintiffs and the defendant, and the matter in controversy as to each of the plaintiffs, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

As will hereinafter more fully appear, the plaintiffs have a common interest in the constitutional questions here involved and in obtaining the relief herein sought.

4.

Heretofore the Congress of the United States passed, and on the 30th day of August, 1935, the President of

the United States approved an Act entitled: "An Act to stabilize the bituminous coal mining industry and promote its interstate commerce; to provide for the cooperative marketing of bituminous coal; to levy a tax on bituminous coal and provide for a drawback under certain conditions; to declare the production, distribution and use of bituminous coal to be affected with a national public interest; to conserve the bituminous coal resources of the United States; to provide for the general welfare and for other purposes; and providing penalties."

Section 1 of said Act is as follows:

> "That it is hereby recognized and declared that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected with a national public interest; that the service of bituminous coal in relation to the industrial activities, the transportation facilities, the health and comfort of the people of the United States; the conservation of bituminous coal deposits in the United States by controlled production and economical mining and marketing; the maintenance of just and rational relations between the public, owners, producers and employees; the right of the public to constant and ample supplies of coal at reasonable prices; and the general welfare of the Nation require that the bituminous coal industry be regulated as herein provided.
>
> "It is further recognized and declared that all production of bituminous coal and distribution by the producers thereof bear upon and directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce and the national public service of bituminous coal and the normal governmental revenues derivable from such industry; that the excessive facilities for the production of bituminous coal and the overexpansion of the industry have led to practices and methods of production, distribution, and marketing of such coal that waste such coal resources of the Nation, disorganize the interstate commerce in such coal and portend the destruction of the industry itself, and burden and obstruct the interstate commerce in such coal, to the end that control of such production and regulation of the prices realized by the producers thereof are necessary to promote its inter-

state commerce, remove burdens and obstructions therefrom, and protect the national public interest therein; that practices prevailing in the production of bituminous coal directly affect its interstate commerce and require regulation for the protection of that commerce, and that the right of mine workers to organize and collectively bargain for wages, hours of labor and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs detrimental to fair competition in the interstate marketing of bituminous coal, and in order to avoid these obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines."

Section 2 of the Act creates a National Bituminous Coal Commission, which will hereinafter be referred to as the Commission, composed of five members appointed by the President, by and with the advice and consent of the Senate, for a term of four years, or until the prior termination of the Act, which, by its terms, expires four years after the date of its approval by the President.

Section 3 of the Act provides:

"There is hereby imposed upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine, such tax, subject to the later provisions of this section, to be payable to the United States by the producers of such coal, and to be payable monthly for each calendar month, on or before the first business day of the second succeeding month, and under such regulations, and in such manner, as shall be prescribed by the Commissioner of Internal Revenue: **Provided**, That in the case of captive coal produced as aforesaid, the Commissioner of Internal Revenue shall fix a price therefor at the current market price for the comparable kind, quality, and size of coals in the locality where the same is produced: **Provided further**, That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in Section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the

amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer."

Section 9 likewise provides that producers refusing to accept the code formulated under section 4 of the Act shall be liable for the full amount of the 15% tax imposed by section 3.

Section 4 of the Act requires the formulation by the Commission of a working agreement to be known as the "Bituminous Coal Code," such code to deal with the matters enumerated in section 4 and to otherwise conform to the provisions and requirements of that section. The entire bituminous producing coal area of the United States, by section 4 is divided into nine minimum price areas, and still further divided into twenty-three producing districts, each of such minimum price areas embracing one or more producing districts, as specifically set out in section 4. It is provided by section 4 that the code required to be established in accordance with its terms shall be administered and enforced by the Commission, as to all matters other than labor relations between the producers and their employees, through district boards selected by each of the twenty-three districts in the manner therein provided; and as to such labor relations, by the Commission, through a Bituminous Coal Labor Board consisting of three members appointed by the President of the United States, by and with the advice and consent of the Senate. Each district board, subject to the supervision and approval of the Commission, is required to immediately establish minimum prices free on board transportation facilities at the mines for all kinds, qualities and sizes of coal produced in their respective judisdictions, with full authority in establishing such minimum prices to make such classifications of

coals and price variations as to mines and consuming market areas as it may deem necessary and proper.

It is further provided that in order to sustain the stabilization of wages, working conditions and maximum hours of labor, such minimum prices shall be established so as to yield a return per net ton for each district in its minimum price area, equal as nearly as may be to the weighted average of the total costs per net ton of the tonnage of such minimum price area, such total costs per net ton to be determined according to the formula attempted to be set up in said section. The district boards are further required, under the rules and regulations established by the Commission and subject to the supervision and approval of the Commission, to coordinate in common consuming market areas, upon a fair competitive basis, the minimum prices, and the rules and regulations established by them for their respective districts, and in effecting such coordination such district boards are required to take into account the factors set out and the rules attempted to be laid down in said section.

Section 4 further authorizes the Commission, whenever it deems it necessary so to do, in order to protect the consumer of coal against unreasonably high prices therefor, to fix maximum prices free on board transportation facilities for coal in any district, such maximum prices to be established in accordance with the formula therein attempted to be set out.

All contracts for the sale of coal below the minimum or above the maximum therefor approved and established by the Commission and in effect at the time of the making of the contract, are declared by such section to be invalid and unenforceable, and after the date of the approval of the Act and until the minimum prices have been established as therein provided, producers accepting the code are prohibited from making any contract for the sale of coal calling for delivery more than thirty days from the date of the contract; and code members are further prohibited, while the Act is in effect, from making any contract for the sale of coal calling for delivery after the expiration of the Act at a price below the minimum or above the maximum therefor approved or established by the Commission and in effect at the time of the making of such contract.

Section 4 further provides that the code formulated under its terms shall prohibit its members from engaging in certain practices enumerated in that section as unfair methods of competition, many of which are de-

signed and were intended to prohibit and prevent the evasion of the minimum prices fixed in the code and in section 4 of the Act, and to compel the producer to sell his coal to all persons similarly circumstanced at the same price.

All producers accepting and operating under the code are prohibited from interfering with or denying the right of their employees to organize and bargain collectively through representatives of their own choosing, and from requiring any employee, as a condition of employment, to join a company union, and from prohibiting employees from selecting their own check weighmen to inspect the weighing and measuring of coal, and from requiring, as a condition of employment, that their employees shall live in company houses or trade at the store of their employer.

It is further provided by section 4 that the code formulated under its terms shall provide that whenever maximum daily or weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds of the annual national tonnage production of bituminous coal for the preceding calendar year, and the representatives of more than one-half of the mine workers employed, such maximum hours of labor shall be accepted by and binding upon all code members; and that any wage agreement or agreements negotiated by collective bargaining in any district, or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the labor board provided for in section 4 of the Act, and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts.

It is further provided by section 4 that any code member injured in his business or property by any other code member by reason of the doing of any act which is forbidden, or the failure to do any act which is required by the Act or by the code formulated thereunder, may sue for damages on account thereof in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold damages and the costs of the suit, including a reasonable attorney's fee.

Section 5 of the Act provides that each producer of bituminous coal accepting membership in the code shall execute and acknowledge such acceptance on a form prepared and supplied by the Commission. This section further provides that the membership of any such producer in the code, and his right to a drawback on the taxes levied under section 3 of the Act, subject to the right of review as provided in the Act, may be revoked by the Commission upon written complaint and hearing as therein provided.

5.

Plaintiffs state that the Congress of the United States under the Constitution has no jurisdiction over and no power to legislate upon the matters required by section 4 of the Act to be embraced in the bituminous coal code therein required to be formulated, and, without excluding objections to the constitutionality of other provisions of the Act, plaintiffs charge particularly that the fixing of minimum and maximum prices of coal free on board transportation facilities at the mines; the requirement that coal shall be sold by producers to all customers similarly circumstanced at the same price; the regulation and control of contracts for the sale of coal; and the regulations of the relations between producers and their employees in the production of coal, including the regulation and fixing of wages and hours of service as authorized in part III of section 4, are each and all matters not within the competency of Congress under the Constitution of the United States; and the attempted regulation by Congress of the above enumerated matters is violative of the due process clause of the Fifth Amendment to the Constitution of the United States, and of the reserved rights of the States and the people, secured to them by the Tenth Amendment thereof. Plaintiffs state that section 4 is unconstitutional, for the further reason that it attempts to delegate legislative power.

6.

Plaintiffs state that Congress, notwithstanding its lack of power to legislate on the subjects required by section 4 to be embraced in the code to be formulated thereunder, undertook, through the pretended exercise of its taxing power under the Constitution, to coerce all bituminous coal producers in the United States to submit to the unconstitutional Act here under attack, and par-

ticularly to the unconstitutional regulations and requirements under section 4 of said Act and of the code required to be formulated thereunder.

7.

Each of the plaintiffs states that it does not desire to accept the provisions of section 4 of the Act and of the code directed to be formulated thereunder, and has no intention of accepting same and no intention of submitting itself to the jurisdiction of the Commission and the other agencies charged with the administration and enforcement of such code and no intention of operating under said provisions, but desires and intends to exercise its constitutional right to conduct its business of producing and selling bituminous coal, which business is a strictly private one and not affected with a public interest, the declaration of Congress in the preamble to the bill to the contrary notwithstanding, free of the unconstitutional regulations and restrictions contained in said Act, and particularly in section 4 thereof, and in the code required to be formulated thereunder; but they state that by reason of the provisions of sections 3 and 9 of the Act they are and will be penalized for their failure and refusal to accept and operate under the provisions of section 4 of the Act and of the code formulated thereunder by the imposition of a penalty, denominated in the Act of a tax, equal to fifteen per cent of the sale price at the mine of the coal produced by each of them, whereas those producers who agree to operate under the provisions of section 4 and of the code formulated thereunder are rewarded by a rebate and forgiveness of ninety per cent of the tax or penalty which they would otherwise be required to pay.

8.

They state that sections 3 and 9 of the Act, in so far as they purport to impose upon those producers of bituminous coal who refuse to accept and operate under the provisions of section 4 of the Act, and of the code formulated thereunder, a tax equal to fifteen per cent of the sale price at the mine of the coal produced by them, is not a good faith exercise of the taxing power conferred upon Congress by clause 1 of section 8, article 1 of the Constitution of the United States, but is an unconstitutional attempt on the part of Congress, under the guise of taxation to punish those producers of bituminous coal who are unwilling to surrender their

constitutional right to conduct their business free of unconstitutional interference and regulation by Congress, and the attempted imposition of such penalty operates to deprive these plaintiffs of their property without due process of law, in violation of the Fifth Amendment, and is an unconstitutional invasion of the rights reserved to these plaintiffs by the Tenth Amendment to the Constitution of the United States.

9.

Plaintiffs state that the average total sale value at the mines of the coal produced and sold by each of them each calendar month, and the amount of penalty which the said Act attempts to impose upon them, in the guise of a tax because of their refusal to surrender their right to conduct their business free of unconstitutional interference by the National Government, is approximately as follows:

Name of Plaintiff	Average Total Sales Per Month	Monthly Penalty or Tax
R. C. Tway Coal Company.....	$44,000	$6,600
Kentucky Cardinal Coal Corp....	20,000	3,000
Harlan-Wallins Coal Corp.....	139,925	21,000
Creech Coal Company	63,000	9,500
Harlan Central Coal Company...	18,000	2,700
Harlan Fuel Company	54,000	8,100
Crummies Creek Coal Company..	68,000	10,000
Three Point Coal Company.....	33,000	4,900
Clover Fork Coal Company.....	14,000	2,100
Harlan Collieries Company	38,000	4,800
High Splint Coal Company	42,000	6,400
Cornett-Lewis Coal Company....	42,000	6,300
Kentucky King Coal Company..	7,000	1,100
P. V. & K. Coal Company	9,416	1,400
Green-Silvers Coal Corp	14,761	2,200
Mary Helen Coal Corp.	47,648	7,100

10.

They state that the profit realized and realizable by each of them on the gross sale price of the coal produced by them each month over the cost of production, under prudent and economical operation, is not over five per cent of such gross sale price, and such profit is not less than the profit realized by producers generally in the field in which plaintiffs' mines are located. It is thus apparent that the penalty of fifteen per cent imposed

upon them by sections 3 and 9 of the Act is far in excess of the profit realized by each of them on the gross sale price of the coal produced by them each month over and above the cost of producing same, and, if required to pay such penalty, their respective operations can only be conducted at a disastrous loss each month, which can be met only out of their capital and surplus, and the necessary and deliberately intended result of the imposition of the so-called tax is to leave them no choice, if they refuse to operate under the provisions of section 4 of the Act and of code formulated thereunder, except to either close down their operations, or else to operate at such a disastrous monthly loss that they will quickly be rendered insolvent and unable to operate, in either of which events the Act operates to destroy and confiscate their property and their investment therein. None of the plaintiffs, except the Crummies Creek Coal Company, Clover Fork Coal Company and Harlan Collieries Company, own the fee to the coal land upon which its operation is located and from which it is mining coal; but with the three exceptions mentioned, they are each operating under a lease requiring them to pay a stipulated royalty per ton for each ton of coal mined and sold by them. It is further stipulated in their respective leases that in event the total coal mined in any one year is not sufficient at the fixed royalty rate to produce the minimum royalty fixed in their respective leases, then, in addition to the royalty paid on the coal actually mined, the lessee must pay such further sum as is required to bring the total royalty or rental payments for the particular year involved up to the stipulated annual minimum royalty. The mining plant of each of the lessee plaintiffs is located upon land owned by its landlord, and under the terms of the lease under which it is operating, the landlord has a first lien upon all the improvements placed upon the premises by the lessee and upon all mining equipment of every kind used in its operation, to secure the landlord in the payment of the stipulated royalty, and the lease under which each of the lessee plaintiffs is operating reserves to the landlord the right to forfeit the lease if the lessee remains in default in the payment of royalty beyond the time stipulated in its lease. The plaintiffs state that even should they close down their mines because of the imposition of the so-called tax and of their inability to operate because of the imposition of such so-called tax, they would still be at a heavy expense in the upkeep of their properties, and particularly in keeping same free

from water. Each of the plaintiffs states that substantially all of its capital and surplus is invested in its mine and in the equipment thereon and therein, and the only way it could possibly raise money with which to pay the penalties imposed, over any substantial period of time, is to sell its property, or, if possible, to mortgage same, which would ultimately lead to a sacrifice thereof under foreclosure, as it would have no earnings, after paying such monthly penalties, out of which to satisfy such mortgage; and each of the lessee plaintiffs states that it could only mortgage its plant and its equipment with the consent of the landlord and subject to the prior lien of the landlord for unpaid royalties. Each of the plaintiffs states that it would be impossible to borrow money with which to pay such so-called taxes upon the security of its property, for the further reason that its operating statement would inevitably disclose that it could not operate its mines and pay the monthly penalties exacted by the terms of the Act without sustaining a tremendous loss each month. Therefore, such a statement, which any careful lender of money would demand, would clearly disclose that the money loaned could only be recovered through a sale of the pledged property.

11.

Plaintiffs state that while the so-called tax provision of the Act does not become effective until the first day of the third month following the date of the enactment of the Act, and the monthly payments required thereunder do not became due until the first business day of the second succeeding month, yet the Act imposes upon them such tremendous and unconscionable penalties for their refusal to operate under the terms of section 4 thereof, and of the code formulated thereunder, that they cannot afford to wait until the penalty or tax actually attaches, for the reason that should they do so, before their rights could be finally determined, their property would be confiscated and destroyed through the enforced payment of such penalties during the time their rights were being determined; and for this reason they directed their counsel to notify the defendant, to whom as Collector of Internal Revenue they are required to pay the so-called taxes, that they each regard the Act as unconstitutional and have no intention of accepting or agreeing to operate under the provisions of section 4 of the Act, or of the code formulated there-

under, and to inquire of the defendant what was his attitude with reference to the validity of the Act and what was his intention with reference to the collection of the so-called taxes imposed by the Act upon these plaintiffs; and the defendant, Glenn, in response to such inquiry, asserted that he regarded and intended to treat the Act as constitutional and intended to demand of each of the plaintiffs the amount of taxes assessable under the provisions of the Act, as they matured, and that upon their failure or refusal to pay, he would, by proper procedure, subject their property to the payment of the so-called taxes; and they state defendant will do so.

12.

They state that because each month's payment exacted of these plaintiffs by sections 3 and 9 of the Act will be far in excess of the profits on each month's operation, and can only be paid by a sale of their capital assets, or through a pledge of same under such conditions as would ultimately result in a sale thereof; and because of the further fact that if they should pay such so-called taxes as they accrue, it is within the power of the Commissioner of Internal Revenue, through delay in acting upon the application for a refund, to prevent any suits to recover such so-called taxes until after the expiration of six months after the payment thereof; and because of the further fact that even if they should promptly apply for a refund of the first month's so-called taxes required by the Act to be paid after same have been paid, and the Commissioner of Internal Revenue should promptly deny such application, a suit for the recovery thereof could not be filed and an authoritative adjudication of their rights determined until the latter part of 1936, their capital and surplus will have been consumed, their property sacrificed, and they will have been rendered practically bankrupt before they can recover in a refund action the so-called taxes exacted of them by the Act. They state that Congress has made no appropriation out of which and with which to pay any judgment for refund which may be ultimately secured by them, and it is therefore entirely uncertain when they would be reimbursed on account of the so-called taxes exacted of them by sections 3 and 9 of the Act, even after they secure judgment for same. For all of these reasons they state that that provision of the Federal Statutes which authorizes a suit for the recovery of taxes illegally collected does not afford the plain-

tiffs in this case a full, complete and adequate remedy at law; and to compel them to resort to such a remedy in this case would operate to deprive them of their property without due process of law. Nevertheless, if they refuse to pay the illegal exactions imposed upon them by sections 3 and 9 of the Act, unless protected by the exercise of the equity powers of this court, their property will be sold to satisfy such illegal exactions, and they will each be subject to the imposition of a fine of not exceeding ten thousand dollars, and the officers in charge of their business to a fine of not exceeding ten thousand dollars or imprisonment for twelve months, or both such fine and imprisonment.

Wherefore, reserving the right to hereafter ask for a preliminary injunction if the occasion arises, they pray that upon a final hearing of this cause the said Act be decreed and adjudged unconstitutional, and particularly that the court adjudge and decree as follows:

1. That section 4 of the Act, and of the code required to be formulated thereunder, deal with matters not within the competency of Congress, and that its enforced application to these plaintiffs would deprive them of their property without due process of law, in violation of the Fifth Amendment, and of the rights reserved to them by the Tenth Amendment to the Constitution of the United States.

2. That sections 3 and 9 of the Act are not a good faith exercise of the taxing power of Congress under the Constitution, but an attempt on the part of Congress, under the guise of exerting the taxing power to coerce these plaintiffs and other bituminous coal producers into an acceptance of and submission to regulations by Congress as to matters not within the power of Congress to regulate, and that said sections of the Act deprive these plaintiffs of their property without due process of law, in violation of the Fifth Amendment.

3. That these plaintiffs are not subject to the so-called taxes attempted to be imposed upon them by sections 3 and 9 of the Act, and that the defendant is without constitutional right to enforce or coerce the payment thereof.

4. That section 4 is an unconstitutional attempt to delegate legislative power.

They pray that upon such final hearing defendant be perpetually enjoined from collecting or attempting to collect from any of these plaintiffs the so-called taxes attempted to be imposed upon them by the Act.

They pray for their costs and all other proper and equitable relief to which they may appear to be entitled.

R. C. Tway Coal Company,
Kentucky Cardinal Coal Corporation,
Harlan-Wallins Coal Corporation,
Creech Coal Company,
Harlan Central Coal Company,
Harlan Fuel Company,
Crummies Creek Coal Company,
Three Point Coal Company,
Clover Fork Coal Company,
Harlan Collieries Company,
High Splint Coal Company,
Cornett-Lewis Coal Company,
Kentucky King Coal Company,
P V & K Coal Company,
Mary Helen Coal Corporation,
Green-Silvers Coal Corporation,
By Woodward, Dawson & Hobson,
Attorneys.

State of Kentucky }
Jefferson County }

The affiant, R. C. Tway, says that he is President of R. C. Tway Coal Co., one of the plaintiffs herein, and that the statements of the foregoing bill are true, to the best of his knowledge and belief.

R. C. Tway.

Subscribed and sworn to before me by R. C. Tway this 10th day of September, 1935.

(Seal) Leo Roberts.

My Commission Expires Aug. 23, 1938.

ANSWER OF THE DEFENDANT, SELDEN R. GLENN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY—Filed September 30, 1935.

Comes now the defendant above named, reserving all manner of exceptions that may be had to the uncertainties and imperfections of plaintiffs' bill of complaint and in answer thereto, or to so much thereof as he is advised is material to be answered, says:

1. Defendant admits the averments contained in paragraph one of the bill.

2. Answering paragraph two of the bill defendant admits that he is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Kentucky, that he resides in the city of Louisville, is a citizen of the Commonwealth of Kentucky, and that he is by reason of his said office charged with the performance of certain duties prescribed by law. As to the nature and extent of the duties so prescribed, defendant respectfully invites the Court's attention to the statutes governing the same. Further answering said paragraph defendant avers that the taxing provisions of the Bituminous Coal Conservation Act of 1935 have not yet become effective and that no taxes whatsoever have been assessed, levied or imposed thereunder.

3. Answering the averments contained in paragraph three of the bill defendant denies that there exists between defendant and plaintiffs or any of them any case or controversy involving the sum or value of $3,000 or any other sum, or any case or controversy whatsoever. Defendant also denies that plaintiffs have a common interest in obtaining the anticipatory relief prayed for in the bill.

4. Answering paragraph four of the bill defendant shows that the averments in said paragraph are all conclusions and purport merely to summarize the terms, provisions and contents of certain sections of the Bituminous Coal Conservation Act of 1935 therein referred to. Defendant makes no further answer to said paragraph for the reason that this Court will take judicial notice of the precise contents of said Act.

5. Answering paragraph five of the bill defendant shows that all of the averments or charges therein contained are conclusions of law not requiring answer. Nevertheless defendant denies each and every charge or averment in said paragraph.

6. Answering paragraph six of the bill defendant

denies any lack of power in Congress to legislate on the subjects required by Section 4 of said Act to be embraced in the code to be formulated thereunder; denies that the action of Congress in enacting, under its taxing power, the tax provisions of said Act was in any sense pretended; nor was it designed to extend the powers of Congress to subject matters lying beyond its constitutional competence. Further answering said paragraph defendant shows that the regulations provided for by Section 4 of the Bituminous Coal Conservation Act of 1935 are valid regulations enacted by Congress under its paramount and expressly granted power to regulate commerce among the states and are, under and by virtue of such power, legally binding upon and enforceable against plaintiffs, as producers and distributors of bituminous coal whose operations are in or directly and substantially affect interstate commerce. Furthermore, said Act provides expressly that an acceptance of the contemplated code by plaintiffs or by any of them shall not preclude or estop them from contesting the constitutionality or validity of any code provision as applicable to them or to any of them.

7. Answering paragraph seven of said bill defendant avers that he is without knowledge otherwise than as informed by the averments of the bill of the actual desires or intentions of plaintiffs or any of them; denies that the business of producing and selling bituminous coal is not affected with a public interest; denies that the regulations and restrictions contained in said Act or in Section four thereof are unconstitutional; denies that the excise tax to be imposed by said Act is a penalty. Further answering said paragraph defendant incorporates without repetition his affirmative answer hereinabove set forth to paragraph six of the bill.

8. Answering paragraph eight of the bill defendant shows that all of the averments or charges therein contained are conclusions of law not requiring answer. Nevertheless, defendant denies each and every charge or averment in said paragraph.

9. Defendant is without knowledge as to any of the matters of fact averred in paragraph nine of the bill and as to the averments therein contained which are conclusions of law, defendant denies each and every such averment.

10. Answering paragraph ten of the bill defendant says that he is without knowledge of the profit realizable by plaintiffs or any of them or by producers generally in the field as a result of their respective operations; or of

the source or nature of their respective titles to or of the terms of the leases under which they occupy their respective properties; or of the amount or character of their respective capital investments or of the ultimate effect the payment of said tax would have upon their financial status or the financial status of any of them; or of any of the matters of fact averred in said paragraph. Further answering said paragaph defendant shows that all of the averments therein contained are immaterial herein because no tax has been levied, assessed or imposed on plaintiffs or any of them nor will plaintiffs or any of them ever be subjected by said Act to the injury alleged because they may elect to accept said code and the acceptance thereof will cause them no injury for the reason that such acceptance of the code to be formulated under said Act specifically does not estop or preclude them, or any of them, from refusing to abide by any or all regulations imposed by said Act or code and questioning the validity of the same, and said Act prescribes a full and adequate statutory remedy therefor.

11. Answering paragraph eleven of the bill defendant admits that the tax provisions of the Act do not become effective until the first day of the third month following the date of enactment of the Act and that the monthly tax payments required thereunder do not become collectible until the first business day of the second succeeding month thereafter. Defendant further shows that if the code provided for in Section 4 is not formulated by the first day of the third month following the date of enactment of the Act then the tax provisions of the Act will not go into effect until said code is formulated and the date of formulation promulgated by the President. Defendant shows further that said code has not as yet been formulated and that he has no means of knowing when said code will be formulated. Defendant admits that counsel for plaintiffs made such inquiry of him as is alleged in said paragraph, but avers that in response thereto he answered merely that he regarded the Act as constitutional and would perform the duties required of him by law. Defendant denies that said Act imposes tremendous or unconscionable penalties, or any penalties as alleged, or that plaintiffs cannot afford to wait until a tax is actually imposed upon them thereunder, and denies also that their property or the property of any of them would be confiscated and destroyed during such time as their asserted rights were being determined in a court of law or in the statutory method prescribed by the Act, that is to say, by appeal to a Circuit

Court of Appeals of the United States from an order of the National Bituminous Coal Commission. Further answering said paragraph defendant shows that the averments therein contained are immaterial for the reasons hereinabove stated with reference to the averments of paragraph ten of the bill.

12. Answering paragraph twelve of the bill defendant denies that plaintiffs have not an adequate remedy at law for their asserted injuries to which they fear they may be subjected in the future, and avers that plaintiffs may pay any tax which may hereafter be assessed against them or any of them under the provisions of said Bituminous Coal Conservation Act of 1935 and thereafter sue in the Court of Claims or elsewhere to recover the same and that such remedies at law are by the provisions of Section 3224, Revised Statutes (U. S. C. Title 26, Sec. 154), expressly made exclusive. Further answering said paragraph, defendant shows that the averments therein contained are immaterial herein for the reasons hereinabove particularly set out in defendant's answer to paragraph ten of the bill.

13. Defendant denies each and every averment contained in the bill not hereinbefore expressly admitted, explained or denied.

II.

Further answering the bill of complaint and as a separate defense thereto, defendant says and avers:

Bituminous coal is consumed in every State of the United States in generating energy for the production of light, heat and power. It furnishes approximately 45 percent of the total energy consumed for such purposes in the United States. Its use for the aforesaid purposes is indispensable to the industrial and economic life and to the health and comfort of the inhabitants of every State and is vital to the national public welfare.

Commercially important deposits of bituminous coal within the United States are limited to 23 producing areas confined within the boundaries of 26 States and more than 70 percent of the total annual output is mined in four States. Approximately 85 percent of the bituminous coal produced within the United States is consumed (a) in States other than the States in which it was mined, or (b) by railroads engaged in interstate commerce. Over 20 percent of the total annual production of bituminous coal is required for the use of such interstate railroads as fuel. The distribution of bitumi-

nous coal from the producing areas to the consuming public throughout the nation supplies over 17 percent of the total gross freight revenues of the railroads engaged in interstate commerce.

In view of the great present importance of bituminous coal as a source of energy for industrial and domestic purposes, and in view of the necessity of transporting it across State lines to reach the great majority of the users, it is of particular importance to the national public welfare that the distribution and marketing of bituminous coal in interstate commerce be not subjected to interruptions, dislocations, burdens, or restraints. For many years the distribution and marketing of bituminous coal in interstate commerce has been subject (a) to sudden unforseeable, recurrent and prolonged interruptions and stoppages in the shipment of such coal from the producing areas to the consuming markets; (b) to sudden, recurrent and extremely wide fluctuations in the price of such coal to the consuming public, resulting in hardship and inconvenience to the consuming public in other States than the State of production, and tending directly and substantially to restrict and control the movement of coal in interstate commerce; (c) to unfair and demoralized methods of competition throughout the industry which operate directly and substantially to burden and restrain interstate commerce in bituminous coal, and such burdens, restraints and interruptions have operated so as to affect seriously and injuriously a multitude of consumers of bituminous coal throughout the country, to cause a substantial waste of the coal resources of the nation, to bring about the bankruptcy of many coal producers and to result in widespread unemployment. Such conditions have resulted in serious and widespread reigns of disorder and violence requiring resort on the part of public authorities and of the private parties directly concerned therewith to the State and Federal courts of law and equity and necessitating the use of State militia and of Federal troops.

For the purpose of determining the cause or causes of the burdens, restraints and interruptions aforesaid and of providing appropriate legislative measures to remove or control the same, various Congresses of the United States have, since the year 1918, made or caused to be made, among others, the following fact-finding investigations into the conditions under which bituminous coal is produced, distributed and marketed throughout the United States, viz.

Hearings before the Committee on Manufactures of the Senate on Shortage of Coal (65th Cong., 2nd Sess., 1918);

Hearings before the Committee on Interstate Commerce of the Senate on Increased Price of Coal (66th Cong., 1st Sess., 1919, 1920, 1921);

Hearings before the Committee on Reconstruction and Production of the Senate on Coal and Transportation (66th Cong., 3rd Sess., 1920, 1921);

Hearings before the Committee on Education and Labor of the Senate on Conditions in the West Virginia Coal Fields (67th Cong., 1st Sess., 1921, 1922);

Hearings before the Committee on Labor of the House of Representatives on Labor Conditions in the Coal Industry (67th Cong., 2nd Sess., 1922);

Report of the United States Coal Commission pursuant to the Act of September 22, 1922, published in 1925;

Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Coal Legislation 69th Cong., 1st Sess., 1926);

Hearings before the Committee on Interstate Commerce of the Senate on Conditions in the Coal Fields of Pennsylvania, West Virginia, and Ohio (70th Cong., 1st Sess., 1928);

Hearings before the Committee on Interstate Commerce of the Senate on Proposed Bituminous Coal Legislation (70th Cong., 2nd Session., 1929);

Hearings before the Committee on Mines and Mining of the Senate on the Creation of a Bituminous Coal Commission (72nd Cong., 1st Sess., 1932);

Hearings before the Committee on Interstate Commerce of the Senate on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935);

Hearings before the Committee on Ways and Means of the House of Representatives on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935).

From the facts disclosed in and by the aforesaid legislative investigations, and otherwise, it was and is made evident and defendant avers the facts to be that the aforesaid burdens and restraints upon and interruptions to such commerce in bituminous coal are presently, primarily and directly due to and caused and occasioned by the existence of an abnormal and destructive competi-

tive rivalry for markets between the said several producing areas and between the producing units therein contained; that such unbridled competition has resulted in a reduction of the average mine realization price of bituminous coal to a level frequently below the average cost of production of such coal; that over 60% of the cost of producing bituminous coal in the United States is attributable to the cost of labor going directly into its production and that such labor cost is the principal element that is subject to appreciable adjustment; that as a direct result of such competition wages in said industry have been progressively forced down to a point below subsistence levels; that numerous controversies resulting in strikes and lockouts and in the interruption, cessation and dislocation of production and distribution have resulted directly from such price and wage reductions and from the refusal of employers to bargain collectively relative thereto and from various unfair labor practices; that to remove or control the aforesaid direct and substantial burdens upon and interruptions to interstate commerce in bituminous coal it is necessary that competition between the various producing areas aforesaid in the consuming markets of the several states be regulated by the elimination of unfair competitive marketing practices, by the fixing between fair and reasonable limits of the price at which such coal may be distributed in such consuming markets and by stabilizing and equalizing as between producing areas and between the producing units therein contained the wages and hours of labor of employees, and by otherwise eliminating the causes of strikes and lockouts.

The plaintiffs herein are engaged in the business of producing bituminous coal for distribution and sale in interstate commerce and of distributing and selling bituminous coal in such commerce and in the conduct of such business are subject and amenable to federal regulation to the extent and in the manner prescribed by the code provided for in Section 4 of the said Bituminous Coal Conservation Act of 1935.

III.

For a further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendant says that the facts alleged in said bill are insufficient to constitute a cause of action in equity because

1. The Bituminous Coal Conservation Act of 1935 exempts the plaintiffs from ninety per cent of the tax

imposed by said Act if they file an acceptance of the Code to be formulated under said Act. After such acceptance, the plaintiffs would only be subject to the aforesaid ninety per cent of the tax upon revocation of their membership in the said Code by the National Bituminous Coal Commission. Such revocation is subject to judicial review before becoming effective. The Act provides that acceptance of the Code will not preclude or estop any producer from contesting the constitutionality of any code provision or its validity as applied to him. The plaintiffs may, therefore, avoid the payment of ninety per cent of the said tax without in any way abandoning any constitutional rights or binding themselves to obey any unconstitutional provisions of the Code, and the Act provides an adequate and complete administrative and judicial remedy for the protection of their constitutional rights. The bill of complaint fails to allege that the payment of ten per cent of the tax will cause plaintiffs irreparable injury; nor does it allege that acceptance of the Code by plaintiffs will cause them any injury, irreparable or otherwise. Plaintiffs have thus not shown that they will suffer any irreparable injury except because of their own voluntary and arbitrary choice to refuse to file their acceptance of the Code and to avail themselves of the full and adequate protection and remedies provided in the Act. Under such circumstances, they are not entitled to relief in a court of equity.

2. The bill of complaint herein is premature since no tax is as yet in effect, since the tax prescribed by the Act cannot in any event become effective until November 1, 1935, and if no Code has been formulated by that date, until the date upon which the Commission formulates the Code prescribed by the Act, and since no tax has been levied or assessed against these plaintiffs.

3. This bill of complaint seeks an injunction to restrain the collection of a tax, and cannot be maintained in view of the provisions of Section 3224 of the Revised Statutes of the United States. (U. S. C., Title 26, Sec. 154.)

Wherefore, having thus made answer to all matters and things contained in plaintiffs' bill of complaint, defendant prays that plaintiffs take nothing by reason thereof and that he be hence dismissed with his costs.

Bunk Gardner,
United States Attorney,
Oldham Clarke,
Assistant United States Attorney,
Attorneys for defendant.

Answer of the Defendant, Selden R. Glenn, etc.

John Dickinson,
Assistant Attorney General,
F. B. Critchlow,
Special Assistant to the Attorney General,
Carl McFarland,
Special Assistant to the Attorney General,
Of Counsel.

State of Kentucky, }
County of Jefferson. } ss.

The affiant, Selden R. Glenn, Collector of Internal Revenue for the District of Kentucky and the defendant herein, says that the statements in the foregoing answer are true to the best of his knowledge and belief.

S. R. Glenn.

Subscribed and sworn to before me this 30th day of Sept., 1935.

J. S. Bate, Jr.,
Notary Public, Jefferson County, Ky.

My commission expires Sept. 23, 1936.
(Seal)

ORDER FILING DEFENDANT'S ANSWER—September 30, 1935—Entered by Judge Hamilton.

Came the defendant, by counsel, and tendered an answer of defendant, individually and as Collector of Internal Revenue for the District of Kentucky, which is ordered to be filed.

PETITION OF PIONEER COAL COMPANY AND BLACK STAR COAL COMPANY TO BE MADE PARTIES HEREIN—Filed Oct. 9, 1935.

Now come the petitioners and state that they are each corporations organized under the laws of the State of Delaware, and they are each citizens of that State. They are each, as such corporation, authorized to contract and be contracted with, and to sue in their respective corporate means. They state that they are each, as they are authorized to do by their respective charters, engaged in the mining and production of bituminous coal from their mines located in Bell and Harlan Counties, Kentucky, respectively, and in the sale of the coal so produced by them; that the average total sale price at the mines of the coal produced and sold by the petitioner, Pioneer Coal Company, each calendar month is $25,000, and by the petitioner, Black Star Coal Company, $65,000, and that the average monthly tax or penalty which they are required to pay under the Act referred to in the bill herein for their refusal to accept and operate under the Code provided for in the Act will amount to $3750 and $9750, respectively, whereas, the profit realized and realizable by each of them on the gross sale price of the coal produced by them each month, over and above the cost of production under prudent and economical operation, is not over five per cent of such gross sale price.

They state that except as herein specifically set out, each and all of the allegations of the bill herein are applicable to each of these petitioners, and they each adopt same as fully as if set out herein.

They further state that they have a common interest with the plaintiffs in the original bill in the constitutional questions involved therein, and in obtaining the relief sought by the original plaintiffs in their bill; and they therefore ask that they be made parties plaintiff to this action.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

ORDER—Filed October 9, 1935.

This day came Pioneer Coal Company and Black Star Coal Company, and tendered and offered to file their petition to be made parties plaintiff herein, which petition is ordered to be filed; and it appearing from same that the said petitioners have an interest in common with the other plaintiffs in the controversy herein involved, and in the relief sought; and it further appearing that the amount involved as to each of them, exclusive of interest and costs, is in excess of $3,000, and that to make them parties plaintiff will not interfere with the orderly progress of the case,—

It Is Ordered that they be and they are hereby made parties plaintiff to this action.

Elwood Hamilton,
Judge.

AMENDED BILL—Filed October 21, 1935.

The plaintiffs, R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King Coal Company, P. V. & K. Coal Company, Mary Helen Coal Corporation, Green-Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, by leave of court amend their bill herein, and reaffirming each and all of the allegations of their original bill, by way of amendment, state that substantially all the coal mined and sold by each of them is sold f. o. b. the railroad cars at their respective mines, and that while the greater part of same is sold to customers in other States, a substantial part thereof is sold

to customers in the State of Kentucky, and thus they are each, in the selling end of their business, engaged in both interstate and intrastate commerce; that in the field in which they operate substantially four per cent of the entire production is sold to customers in the State of Kentucky, and this is true as to each of the plaintiffs, while some of the plaintiffs sell even a greater percentage of the coal produced by them to customers in Kentucky.

The total annual production of bituminous coal in the United States is approximately 330,000,000 tons, and that entire production, with the exception of an immaterial amount consigned to prepay stations, is sold f.o.b. the railroad cars at the mine of the producing company. Approximately 14 per cent of the total annual production is sold to customers living in the State in which the coal is produced, and the remainder in States other than the one in which the coal is produced.

The greatest competitors of the plaintiffs are mines located in the States of Ohio, West Virginia and Pennsylvania.

The average annual production of bituminous coal in Kentucky is approximately 35,000,000 tons, and of this total amount approximately four per cent is sold to customers in the State and the remainder thereof to customers living in other States.

The average annual production of bituminous coal in the State of Ohio is approximately 18,000,000 tons. Of this amount approximately 44 per cent is sold to customers in the State of Ohio, excluding coal sold and delivered to railroads for fuel in the State of Ohio, and approximately 18 per cent of this annual production is sold to such railroads.

The average annual production of bituminous coal in the State of Pennsylvania is approximately 80,000,000 tons, and of this amount, exclusive of the coal sold and delivered in that State to railroads for fuel, approximately 38 per cent is sold to customers within the State and approximately 12 per cent to railroads in the State for fuel.

The average annual production of bituminous coal in the State of West Virginia is approximately 90,000,000 tons, and exclusive of the coal sold and delivered to railroads in that State for fuel, approximately four per cent of the total annual production is sold to customers in that State and approximately seven per cent is sold and delivered in that State to railroads for fuel.

They state that substantially all the men employed by each of them in connection with their mining opera-

tions are employed in the production of coal, and have no duties whatever to perform in connection with the sale of the product after it is mined.

Wherefore, they pray as in their original bill.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

State of Kentucky, }
Jefferson County. }

The affiant, R. C. Tway, states that he is President of the plaintiff, R. C. Tway Coal Company, and that the statements of the foregoing amended bill are true.

R. C. Tway.

Subscribed and sworn to before me by R. C. Tway, this October 21, 1935.

My commission expires 23rd day of August, 1938.

Leo Roberts.

(Seal)

ORDER—Filed October 21, 1935.

This day came the plaintiffs and tendered and offered to file their amended bill, and the court being advised—

It Is Ordered that said amended bill be and the same is filed.

Elwood Hamilton,
Judge.

PETITION OF GATLIFF COAL COMPANY TO BE MADE A PARTY PLAINTIFF—Filed October 21, 1935.

Comes the petitioner, Gatliff Coal Company, and states that it is a corporation organized under the laws of the Commonwealth of Kentucky, and it is a citizen of that State, with its principal office and place of business at Williamsburg, Kentucky. As such corporation it is authorized to contract and to be contracted with, to sue and be sued in its corporate name aforesaid. It states that it is, as it is authorized to do by its charter, engaged in the mining and production of bituminous coal from its mines located in Whitley County, Kentucky, and in the sale of the coal so produced by it. It states that its coal is sold f. o. b. railroad cars at its mines in Whitley County, Kentucky, and that while the greater part of the coal thus sold is to customers living in States other than Kentucky, a substantial part of the coal so sold is consigned to customers living in the Commonwealth of Kentucky, and its business of selling coal is therefore both interstate and intrastate business. It states that its average total sale price at the mines of the coal produced and sold by it each calendar month is approximately $23,000, and that the average monthly tax or penalty which it is required to pay under the Act referred to in the bill herein for its refusal to accept and operate under the code provided for in the Act will amount to approximately $3,450, whereas the profit realized and realizable on the gross sale price of the coal produced and sold by it each month, over and above the cost of production under prudent and economical operation, is not over five per cent of such gross sale price.

It states that except as herein specifically set out, each and all of the allegations of the bill herein are applicable to it, and it adopts said allegations as fully as if set out herein.

It states that it has a common interest with the plaintiffs in the original bill in the constitutional questions involved therein, and in obtaining the relief sought by the original plaintiffs in their bill, and it therefore asks that it be made a party plaintiff to this action.

Woodward, Dawson & Hobson,
Attorneys for Plantiff.

Affidavit

State of Kentucky, }
Jefferson County. }

The affiant, Chas. I. Dawson, states that he is of counsel for Gatliff Coal Company, and that none of its officers are in this district to verify the foregoing petition. He states that from information received from that company he believes the foregoing statements are true.

Chas. I. Dawson.

Subscribed and sworn to before me by Chas. I. Dawson this Oct. 21, 1935.

My commission expires August 9, 1939.

Addie Brumfield,
Notary Public.

ORDER—Filed October 21, 1935.

This day came Gatliff Coal Company and tendered and offered to file its petition to be made a party plaintiff herein, which petition is ordered to be filed; and it appearing from same that said petitioner has an interest in common with the other plaintiffs in the controversy herein involved and in the relief sought; and it further appearing that the amount involved as to the said Gatliff Coal Company, exclusive of interest and costs, is in excess of Three Thousand Dollars ($3,000.00), and that to make it a party plaintiff will not interfere with the orderly progress of the case—

It Is Ordered that said Gatliff Coal Company be and it is hereby made a party plaintiff to this action.

Elwood Hamilton,
Judge.

MOTION—Filed October 21, 1935.

The plaintiffs move the court to strike from the defendant's answer all of Paragraph II thereof, for the reason that alleged facts therein set out are not sufficient either in law or in equity to constitute a defense to the cause of action set up in plaintiffs' bill.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

AMENDED BILL IN EQUITY—Filed November 1, 1935.

The plaintiffs, R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King Coal Company, P. V. & K. Coal Company, Mary Helen Coal Corporation, Green-Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, by leave of court amend their original and amended bills herein, and reaffirming each and all of the allegations of their original and first amended bills, by way of further amendment state that Subsection (e) of Part II of Section 4 of the Bituminous Coal Conservation Act in part provides:

> "(e) Subject to the exceptions provided in section 12 of this Act, no coal shall be sold or delivered at a price below the minimum or above the maximum therefor approved or established by the Commission, and the sale or delivery of coal at a price below such minimum or above such maximum shall constitute a violation of the code.

"Subject to the exceptions provided in section 12 of this Act, a contract for the sale of coal at a price below the minimum or above the maximum therefor approved or established by the Commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable."

Section 12 of the Act provides as follows:

"No coal may be delivered upon a contract made prior to the effective date of this Act at a price below the minimum price at the time of delivery upon such contract, as established pursuant to Part II of section 4 of this Act, and such contract shall be invalid and unenforceable: Provided, That this prohibition shall not apply (a) to a lawful and bona fide written contract entered into prior to October 2, 1933; nor (b) to a lawful and bona fide written contract entered into subsequent to that date and prior to May 27, 1935, at not less than the minimum price current as published under the Code of Fair Competition for the Bituminous Coal Industry, pursuant to the National Industrial Recovery Act, at the time of making of such contract; nor (c) to a lawful and bona fide written contract entered into on or after May 27, 1935, and prior to the date of the approval of this Act, at not less than the minimum price for current sale as published under said code of fair competition, as at May 27, 1935."

Plaintiffs state that each of them, with the exception of Kentucky King Coal Company, now has and had at the time the Bituminous Coal Conservation Act became effective, and at the time the code provided for by Section 4 of the Act was formulated and promulgated, written contracts with numerous customers made after October 2, 1933, for the sale of coal at prices below the minimum prices required by Section 4 to be fixed according to the formula therein set out, and below the minimum prices current as published under the Code of Fair Competition for the Bituminous Coal Industry pursuant to the National Industrial Recovery Act at the time such contracts were made, and below the minimum prices for the current sale of coal as published under said Code of Fair Competition as at May 27, 1935; and that the provisions of the said Act herein quoted undertake to render invalid and abrogate these contracts

should these plaintiffs accept the provisions of the code required to be formulated under Section 4 of the Act. They state that should they refuse to comply with said contracts according to their terms, they would each be subject to the payment of damages to the customers with whom they have such contracts, and to a multiplicity of suits for the recovery of such damages. They further state that the attempt of Congress, through the imposition of the so-called taxes provided by Sections 3 and 9 of the Act, to coerce acceptance of said code, and thereby the breach of such contracts, is an attempt to deprive them of their property rights in said contracts without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and to impose upon them a liability for damages on account of such breach, which likewise, to the extent of such damages, will deprive them of their property without due process of law, in violation of the Fifth Amendment.

Wherefore, they pray as in their original bill, and for all other equitable relief.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

The affiant, J. B. Gatliff, states that he is President of the Gatliff Coal Co., and that the statements of the foregoing amended bill are true, as he verily believes.

J. B. Gatliff.

Subscribed and sworn to before me by J. B. Gatliff this 1st day of November, 1935.

Lilburn Phelps, Clerk.

ORDER—Filed November 1, 1935.

This cause came on to be heard and both parties appeared by counsel. The plaintiffs tendered an amended bill which is ordered to be filed. By agreement of parties, the amended bill is controverted of record and the first amended bill is likewise controverted. Then the plaintiffs tendered a motion for preliminary injunction which is ordered to be filed.

The case was argued as to the law by counsel for both sides. Then the plaintiffs introduced evidence in support of the motion for preliminary injunction. Stenographic notes of the testimony were taken by Clarence E. Walker, to be transcribed if required by the Court or by either party, his fees to be charged as costs and assessed as the Court may hereafter direct.

It is Ordered that the further hearing of this case be passed to November 11, 1935, at 9:00 o'clock A. M.

Elwood Hamilton,
Judge.

OBJECTION TO AND MOTION TO STRIKE EVIDENCE—Filed Nov. 11, 1935.

Comes the defendant, Selden R. Glenn, individually, and as Collector of Internal Revenue for the District of Kentucky, and not objecting to the form in which the evidence is presented, but expressly waiving any objection on account of the fact that the witnesses hereinafter referred to did not appear and testify under oath in open court, objects and excepts to the statements in behalf of the plaintiffs of the witnesses, D. B. Cornett, C. V. Bennett, T. B. Whitfield, B. W. Whitfield, W. J. Silvers, B. F. Reed, W. J. Cunningham, George Creech, R. C. Tway, W. H. Barthold, A. K. Robinson, Roy Carson and E. Guthrie, because the matters and facts alleged in said statements, as hereinafter referred to, are irrelevant

and immaterial; and the defendant expressly objects and excepts to the statements of said witnesses in so far as they attempt to show: (a) the conditions under which the respective plaintiffs will be required to operate under the said Act, either as members or non-members of the Code; (b) that the respective plaintiffs will not be able to operate under said Act and pay the required tax; (c) that the respective plaintiffs will be required to defend damage suits for breach of contract as a result of the operation of said Act; and in so far as said statements attempt to show any hardship upon the respective plaintiffs by reason of the provisions of said Act, and in so far as said statements express the opinions and conclusions of the respective witnesses, for the reason that said avowals in said statements are immaterial and irrelevant and can have no effect upon the constitutional questions here involved; and he moves the Court to strike the statements of each of said witnesses with respect to the matters hereinabove referred to as evidence, and permit them to remain in the record only as the avowals of the respective witnesses; and of this he prays the judgment of the Court.

Oldham Clarke,
John S. L. Yost,
Attorneys for Defendant.

OBJECTION TO AND MOTION TO STRIKE EVIDENCE—Filed Nov. 11, 1935.

Come the plaintiffs, R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King

Coal Company, P V & K Coal Company, Mary Helen Coal Corporation, Green-Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, and not objecting to the form in which the evidence is presented, but expressly waiving any objection on account of the fact that the witnesses hereinafter referred to did not appear and testify under oath in open court, object and except to the statements in behalf of the defendant of the witnesses, Frederick C. Tryon, Charles O'Neill, H. L. Findlay, George W. Reed, Fred S. McConnell, Philip Murray, F. E. Berquist and Homer L. Morris, because said statements in their entirety are irrelevant and immaterial; and the plaintiffs expressly object and except to the statements of said witnesses, in so far as they attempt to detail the economic situation in the Bituminous Coal Industry, and in so far as they attempt to deal with the relation of the production of coal to interstate commerce, and in so far as they attempt to deal with the necessity of the regulation by Congress of the Bituminous Coal Industry, and in so far as they express the opinion and conclusions of the respective witnesses, for the reason that said statements are immaterial and irrelevant and can have no effect upon the constitutional questions here involved; and they move the Court to strike the statement of each of said witnesses as evidence, and permit them to remain in the record only as the avowals of the respective witnesses; and of this they pray the judgment of the Court.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

ORDER—Filed Nov. 11, 1935.

Came the plaintiffs, by their counsel, Woodward Dawson & Hobson, and the defendant, by his counsel, Bunk Gardner, United States Attorney for the Western District of Kentucky, and Oldham Clarke, Assistant United States Attorney for the Western District of Kentucky, and John S. L. Yost, Special Assistant to the Attorney-General of the United States, and tendered and offered to file a stipulation of the evidence offered by each of the parties on the final hearing of this cause, which stipulation is ordered filed.

Thereupon came the defendant, by his counsel, and tendered and offered to file his objection to and motion to strike the evidence offered by the plaintiffs under said stipulation other than the evidence of Roy Carson for the reasons stated in said motion, which objection to and motion to strike said evidence is ordered filed, and the Court being advised, overrules said objection to said evidence and said motion to strike same. The court on its own motion strikes the evidence of Roy Carson as irrelevant and immaterial but said statement of said Carson will remain in the record as the avowal of the plaintiffs as to the testimony of said Carson. The defendant excepts to the ruling of the Court in overruling his objections to the evidence of the said witnesses, other than the said Carson, and in overruling his motion to strike same; and the plaintiffs except to the ruling of the Court in striking the evidence of said Roy Carson.

Then came the plaintiffs, by their counsel, and tendered and offered to file their objections to and motion to strike the evidence of the defendant referred to in said stipulation, which objection and motion to strike is ordered filed, and the Court being advised sustains said objection to said evidence and the motion to strike same, but orders that said evidence offered by the defendants shall remain in the record as avowals of the defendant as to what each of said witnesses would testify. The defendant excepts to this ruling of the Court sustaining said objection to said evidence and said motion to strike said evidence.

Thereupon came the parties, by their counsel, and tendered and offered to file a stipulation filing two typical written contracts executed for the sale of coal by plaintiffs after October 2, 1933, and prior to August 30, 1935, said contracts being explained in said stipulation and marked "A" and "B"; said contracts and stipulation to be considered by the Court as evidence in this

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cause. The court being advised, it is ordered that said stipulation and contracts attached thereto be and the same are filed as a part of the record in this case.

It is further ordered by the Court that the plaintiffs' motion to strike paragraph 2 of the defendant's answer be and the same is overruled, to which ruling the plaintiffs except.

By the agreement of the parties, it is now ordered that this case be submitted for final decree.

Elwood Hamilton,
Judge.

OPINION—Filed Nov. 14, 1935.

The three above styled causes relate to the same subject matter and for that reason, this opinion is applicable to all of them, although they have not been consolidated for hearing.

The first suit is an action (Equity #996) instituted by nineteen corporations, all of them miners and producers of bituminous coal in the Eastern Kentucky coal field, and together they represent all the producers of any substantial size in that district except the producers of captive coal.

The plaintiffs state that Selden R. Glenn, defendant, is a citizen of the Commonwealth of Kentucky, residing in Louisville, Jefferson County, in the Western District of Kentucky, and the duly appointed, qualified and acting Collector of Internal Revenue for the District of Kentucky, and as such collects all taxes, assessments and levies made or attempted to be made by the United States which are collectible in Kentucky through the Internal Revenue Department.

This suit is one of a civil nature, arising under the Constitution and laws of the United States, and presents an actual controversy between each of the plaintiffs and

the defendant, and the amount involved exceeds Three Thousand Dollars.

The plaintiffs, after setting out the provisions of Public No. 402, 74th Congress, H. R. 9100, "An Act to Stabilize the Bituminous Coal Mining Industry," claim it is unconstitutional and void on the following grounds:

Section 4 of the Act requires the formulation by the National Bituminous Coal Commission, composed of five members appointed by the President, of a working agreement to be known as the "Bituminous Coal Code," such Code to deal with matters enumerated in Section 4 and to otherwise conform to the provisions and requirements of that section. The entire bituminous coal producing area of the United States, by Section 4, is divided into nine minimum price areas, and further into twenty-three producing districts, each area embracing one or more producing districts. Section 4 provides that the Code required to be established in accordance with its terms shall be administered and enforced by the Commission, as to all matters other than labor relations between the producers and their employees, through district boards selected by each of the twenty-three districts in the manner therein provided; and as to labor relations, by the Commission through a Bituminous Coal Labor Board of three members, appointed by the President of the United States by and with the advice and consent of the Senate. Each district board, subject to the supervision and approval of the Commission, is required to immediately establish minimum prices free on board transportation facilities at the mines for all kinds, qualities and sizes of coal produced in their respective jurisdictions, with full authority in establishing such minimum prices to make such classifications of coals and price variations as to mines and consuming market areas as it may deem necessary and proper.

It is further provided that in order to sustain stabilization of wages, working conditions and maximum hours of labor, such minimum prices shall be established so as to yield a return per net ton for each district in its minimum price area, equal as nearly as may be to the weighed average of the total costs per net ton to be determined according to the formula attempted to be set up in said section. The district boards are further required under the rules and regulations established by the Commission and subject to the supervision and approval of the Commission, to co-ordinate in common consuming market areas upon a fair competitive basis, the minimum

prices, and the rules and regulations established by them for their respective districts, and in affecting such coordination such district boards are required to take into account the factors set out and the rules attempted to be laid down in said Section.

Said Section 4 authorizes the Commission, whenever it deems necessary in order to protect the consumer of coal against unreasonably high prices, to fix maximum prices free on board transportation facilities for coal in any district, such maximum prices to be established in accordance with the formula therein attempted to be set out.

All contracts for the sale of coal below minimum or above maximum therefor approved and established by the Commission and in effect at the time of the making of the contract, are declared by such Section to be invalid and unenforceable, and after the date of the approval of the Act and until the minimum prices have been established as therein provided, producers accepting the Code are prohibited from making any contract for the sale of coal calling for delivery more than thirty days from the date of the contract, and code members are further prohibited, while the Act is in effect, from making any contract for the sale of coal calling for delivery after the expiration of the Act at a price below the minimum or above the maximum therefor approved or established by the Commission, and in effect at the time of such making.

Section 4 further provides that the Code prohibits its members from engaging in certain practices enumerated in said section as unfair methods of competition, many of which are for the purpose of compelling the producer to sell his coal to all persons similarly circumstanced at the same price.

All producers accepting and operating under the code are prohibited from interfering with or denying the right of their employees to organize and bargain collectively through representatives of their own choosing and from requiring any employee, as a condition of employment, to join a company union and from prohibiting employees from selecting their own check weighmen to inspect the weighing and measuring of coal, and from requiring as a condition of employment that their employees shall live in company houses or trade at the store of their employer.

Section 4 also provides that the Code formulated under its terms shall provide that whenever maximum daily or weekly hours of labor are agreed upon in any contract

or contracts negotiated between the producers of more than two-thirds of the annual national tonnage production of bituminous coal for the preceding calendar year, and the representatives of more than one-half of the mine workers employed, such maximum hours of labor shall be accepted by and binding upon all code members, and that any wage agreement or agreements negotiated by collective bargaining in any district, or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the labor board provided for in Section 4 of the Act, and shall be accepted as the minimum wages for the various classifications of labor by the Code members operating in such district or group of districts.

Section 4 further provides that any Code member injured in his business or property by any other Code member, by reason of any breach thereof or the failure to do anything which is required by the Act or the Code formulated thereunder, may sue for damages on account thereof in any District Court of the United States in the District in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover three-fold damages and the costs of the suit, including a reasonable attorney's fee.

The plaintiffs state that the Congress under the Constitution of the United States has no jurisdiction over and no power to legislate upon the matters required by Section 4 of the Act, and charge particularly that the fixing of minimum and maximum prices of coal free on board transportation facilities at the mines; the requirement that coal shall be sold by producers to all customers similarly circumstanced at the same price; the regulation and control of contracts for the sale of coal; and the regulations of the relations between producers and their employees in the production of coal, including the regulation and fixing of wages and hours of service as authorized in part III of Section 4, are all matters not within the competency of Congress under the Constitution of the United States, and their attempted regulation by Congress is violative of the due process clause of the Fifth Amendment to the Constitution, and of the reserved rights of the States and the people, secured to them by the Tenth Amendment. Plaintiffs also state that Section 4 is unconstitutional because it attempts to delegate legis-

lative power and that notwithstanding the lack of power of Congress to legislate on the subject required by Section 4 to be embraced in the Code to be formulated thereunder, it undertook through the pretended exercise of its taxing power under the Constitution to coerce all bituminous coal producers in the United States to submit to the Act, and particularly to the unconstitutional regulations and requirements under Section 4 and of the Code required to be formulated thereunder.

Section 5 of the Act provides that each producer of bituminous coal accepting membership in the Code shall execute and acknowledge such acceptance on a form prepared and supplied by the Commission, and further provides that the membership of any such producer in the Code, and his right to drawback on the taxes levied under Section 3 of the Act, subject to the right of review as provided in the Act, may be revoked by the Commission upon written complaint and hearing.

Each of the plaintiffs states it does not desire to accept the provisions of Section 4 of the Act, and of the Code, and has no intention of accepting same and of submitting itself to the jurisdiction of the Commission and the other agencies charged with the administration and enforcement of such Code, nor of operating under its provisions, but desires and intends to exercise its constitutional right to conduct its business of producing and selling bituminous coal, which is a private one and not affected with a public interest, free of the unconstitutional regulations and restrictions of said Act, particularly in Section 4, but by reason of Sections 3 and 9 they are and will be penalized for failure and refusal to accept and operate under the provisions of Section 4 and of the Code, formulated thereunder, by the imposition of a penalty, denominated as a tax in the Act, equal to fifteen per cent of the sale price at the mine of the coal produced by each of them, whereas the producers who agree to operate under the provisions of Section 4 and of the Code are rewarded by a rebate and forgiveness of ninety per cent of the tax, or penalty, which they would otherwise be required to pay.

Plaintiffs state that Sections 3 and 9 of the Act, insofar as they purport to impose upon those producers of bituminous coal who refuse to accept and operate under the provisions of Section 4 of the Act, and of the Code thereunder, a tax equal to fifteen per cent of the sale price at the mine of the coal produced by them is not a good faith exercise of the taxing power conferred upon Congress by clause 1 of Section 8, Article I of the Consti-

tution of the United States, but is an unconstitutional attempt by Congress under guise of taxation to punish those producers of bituminous coal who are unwilling to surreunder their constitutional right to conduct their business free of unconstitutional interference and regulation by Congress, and the attempted imposition of such penalty operates to deprive these plaintiffs of their property without due process of law.

Plaintiffs state that the average total sale value at the mines of coal produced and sold by each of them each calendar month, and the amount of penalty which the said Act attempts to impose upon them, in the guise of a tax, because of their refusal to surrender their right to conduct their business free of unconstitutional interference by the Government, is approximately as follows:

Name of Plaintiff	Average Total Sales Per Month	Monthly Penalty or Tax
R. C. Tway Coal Company..	$ 44,000	$ 6,600
Kentucky Cardinal Coal Corp.	20,000	3,000
Harlan-Wallins Coal Corp...	139,925	21,000
Creech Coal Company.....	63,000	9,500
Harlan Central Coal Company	18,000	2,700
Harlan Fuel Company.....	54,000	8,100
Crummies Creek Coal Company	68,000	10,000
Three Point Coal Company..	33,000	4,900
Clover Fork Coal Company..	14,000	2,100
Harlan Collieries Company..	38,000	4,800
High Splint Coal Company..	42,000	6,400
Cornett-Lewis Coal Company	42,000	6,300
Kentucky King Coal Company	7,000	1,100
P V & K Coal Company.....	9,416	1,400
Green-Silvers Coal Corp.....	14,761	2,200
Mary Helen Coal Corp.....	47,648	7,100

The plaintiffs state that the profit realized and realizable by each of them on the gross sale price of the coal produced by them each month over the cost of production, under prudent and economical operation, is not over five per cent, and such profit is not less than the profit realized by the producers generally in the field where plaintiffs' mines are located. They state it is, therefore, apparent that the penalty of fifteen per cent imposed on them by Sections 3 and 9 of the Act is far in excess of the profit

realized by each of them on the gross sale price of the coal produced each month, less the cost of producing same, and that if required to pay such penalty they would operate at a disastrous loss each month, which can be met only out of their capital and surplus, and the necessary and deliberately intended result of the imposition of the so-called tax is to leave them no choice, if they refuse to operate under the provisions of Section 4 of the Act and of the Code formulated thereunder, except to either close down their operations or else to operate at such monthly loss they will quickly be rendered insolvent and unable to operate, in either of which events the Act operates to destroy and confiscate their property and their investment therein. None of the plaintiffs, except the Crummies Creek Coal Company, Clover Fork Coal Company, and Harlan Collieries Company own the fee to the coal land upon which its operation is located and from which it is mining coal; but with these exceptions, are operating under a lease requiring them to pay a stipulated royalty per ton for each ton of coal mined and sold. It is also stipulated in their leases that in event the total coal mined in any one year is not sufficient at the fixed royalty rate to produce the minimum royalty fixed in their respective lease, then, in addition, the lessee must pay such further sum as is required to bring the total royalty or rental payments for the particular year involved up to the stipulated annual minimum royalty. The mining plant of each of the lessee plaintiffs is located upon land owned by its landlord, and under the terms of the lease under which it is operating, the landlord has a first lien upon all the improvements placed upon the premises by the lessee, and upon all mining equipment of any kind used in its operation, to secure the landlord in the payment of the stipulated royalty, and the lease under which each of the lessee plaintiffs is operating reserves to the landlord the right to forfeit the lease if the lessee remains in default in the payment of royalty beyond the time stipulated therein. They state that if they should close down their mines because of the imposition of this tax and their inability to operate because of it, they would still be at a heavy expense in the upkeep of their properties, and in particular in keeping same free from water. Each plaintiff states that substantially all of its capital and surplus is invested in its mine and equipment, and the only way it could possibly raise money with which to pay the penalties imposed, over a substantial period of time, is to sell its property, or if possible to mortgage same, which would ultimately lead

to a sacrifice under foreclosure, as it would have no earnings after paying such monthly penalties, out of which to satisfy such mortgage; and each of the lessee plaintiffs states it could only mortgage its plant and equipment with the consent of the landlord, subject to the prior lien of the landlord for unpaid royalties. Each plaintiff states it would be impossible to borrow money with which to pay such so-called taxes upon the security of its property for the further reason its operating statement would disclose it could not operate its mines and pay the monthly penalties exacted by the terms of the Act without sustaining a tremendous loss each month. Therefore, a statement which a careful lender of money would demand, would clearly disclose that the money loaned could only be recovered through a sale of the pledged property.

The plaintiffs state that while the so-called tax provision of the Act does not become effective until the first day of the third month following the date of the enactment of this Act, and the monthly payments required thereunder do not become due until the first business day of the second succeeding month, yet the Act imposes upon them such tremendous and unconscionable penalties for their refusal to operate under its terms, they cannot wait until the penalty or tax actually attaches, for the reason that should they do so, before their rights could be finally determined their property would be confiscated and destroyed through enforced payment while their rights were being determined. For this reason they directed their counsel to notify the Defendant, to whom, as Collector of Internal Revenue, they are required to pay the tax, that they regard the Act as unconstitutional and have no intention of accepting or agreeing to operate under the provisions of Section 4 thereof, or of the Code formulated thereunder, and to inquire of the Defendant what was his attitude with reference to its validity and his intention with reference to the collection of the so-called taxes imposed thereunder. They say that the defendant, Glenn, in response to such inquiry, stated that he regarded and intended to treat the Act as constitutional, and intended to demand of each of the plaintiffs the amount of taxes assessable under its provisions as they matured, and upon their failure or refusal to pay, he would, by proper procedure, subject their property to the payment of the so-called tax.

Plaintiffs state that because each month's payment exacted by Sections 3 and 9 of the Act will be far in

excess of the profits on each month's operation, and can only be paid by a sale of their capital assets, or through a pledge of same under such conditions as would ultimately result in a sale thereof, and because of the further fact that if they should pay such so-called taxes as they accrue, it is within the power of the Commissioner of Internal Revenue, through delay in acting upon the application for refund, to prevent any suits to recover such so-called taxes until after the expiration of six months after the payment thereof, and even if they should promptly apply for a refund of the first month's so-called taxes required by the Act to be paid, after same have been paid, and the Commissioner should promptly deny such application, a suit for the recovery thereof could not be filed and an authoritative adjudication of their rights determined until the latter part of 1936, their capital and surplus will have been consumed, their property sacrificed, and they will have been rendered practically bankrupt before they can recover in a refund action and so-called taxes exacted of them by the Act.

They say Congress has made no appropriation out of which and with which to pay any judgment for refund which may be ultimately secured by them, and it is therefore entirely uncertain when they would be reimbursed on account of the so-called taxes exacted of them by Sections 3 and 9 of the Act, even after they secure judgment for same. For all of these reasons they state that the provision of the Federal Statutes which authorizes a suit for the recovery of illegally collected taxes does not afford the plaintiff's in this case a full, complete and adequate remedy at law, and to compel them to resort to such remedy would operate to deprive them of their property without due process of law; but if they refuse to pay the illegal exactions imposed upon them by Sections 3 and 9 of the Act, unless protected by the exercise of the equity powers of this Court, their property will be sold to satisfy such illegal exactions, and they will each be subject to the imposition of a fine of not exceeding Ten Thousand Dollars, and the officers in charge of their business to a fine of not exceeding Ten Thousand Dollars or imprisonment for twelve months, or both such fine and imprisonment.

Plaintiffs pray that said Act be decreed and adjudged unconstitutional and that such relief as flows to them from so holding be granted.

The Defendant, in his answer, denied the material allegations of the petition, and in addition thereto affirmatively plead that bituminous coal is consumed in

every State in the Union in generating energy for the production of light, heat, and power, and that it is used to produce approximately forty-five per cent of the total energy consumed for such purposes in the United States.

It is further alleged that this use makes such coal indispensable to the economic life, health and comfort of the inhabitants of every State, and is vital to the national public welfare. It is stated that commercial deposits of bituminous coal within the United States are limited to twenty-three producing areas within twenty-six states, and seventy per cent of the total mined is in four states, and that eighty-five per cent of the total produced is consumed (a) in States other than the State in which it was mined, or (b) by railroads engaged in interstate commerce; and that over twenty per cent of the total annual production was used by interstate railroads for fuel. He further alleged that seventeen per cent of the total gross freight revenues was realized from the transportation of bituminous coal.

The Defendant then states that in view of the importance of bituminous coal as a source of energy for industrial and domestic purposes, and in view of the necessity of transporting it across state lines to reach the majority of the users, it is of particular importance to the national public welfare that the distribution and marketing of bituminous coal in interstate commerce be not subjected to interruptions, dislocations, burdens or restraints. For many years the distribution and marketing of such coal has been subject (a) to sudden unforseeable, recurrent and prolonged interruptions and stoppages in the shipment in interstate commerce; (b) to sudden, recurrent and extremely wide fluctuations in the price of such coal to the consuming public, resulting in hardship and inconvenience to it in states other than the state of production,and tending directly and substantially to restrict and control the movement of coal in interstate commerce; (c) to unfair and demoralized methods of competition throughout the industry which operate directly and substantially to burden and restrain interstate commerce in such coal. These burdens, restraints and interruptions have operated with the effect to injure a multitude of the consumers of such coal throughout the country and cause a substantial waste of the coal resources of the nation and the bankruptcy of many coal producers, and widespread unemployment in the industry. These conditions have resulted in serious and widespread reigns of disorder and violence requir-

ing resort by public authorities and private parties directly concerned therewith to the State and Federal Courts of law and equity, and necessitating the use of State militia and of Federal troops to quell disorders. It is then alleged that the Congresses of the United States since the year 1918, made or caused to be made twelve fact-finding investigations into the conditions under which bituminous coal is produced, distributed and marketed throughout the United States; and from the facts disclosed through these investigations that it is evident that the present burdens and restraints upon and interruptions to interstate commerce in bituminous coal are primarily and directly due to an abnormal and destructive competitive rivalry for markets between the several producing areas and between the producing units in the areas, and that such unbridled competition has resulted in a reduction of the mine realization price of such coal to a level frequently below the average cost of production thereof, and that sixty per cent of the cost of producing such coal is attributable to labor going directly into its production, and that such labor cost is the principal element that is subject to appreciable adjustment, and as a direct result of such competition, wages in the bituminous coal industry have been progressively forced down to a point below subsistence levels; and that numerous controversies over wages have resulted in strikes and lockouts, and in the interruption, cessation and dislocation of production and distribution, all of which was directly attributable to price and wage reductions, and because of the refusal of employers to bargain collectively relative thereto and to desist from various unfair labor practices. It is then alleged that in order to remove or control the aforesaid direct and substantial burdens upon the interruptions to interstate commerce in bituminous coal, it is necessary that competition between the various producing areas of such coal in the consuming markets of the several states be regulated by the elimination of unfair competitive marketing practices, by the fixing between fair and reasonable limits of the price at which said coal may be distributed in consuming markets and further by stabilizing and equalizing as between producing areas and between the producing units in the area, the wages and hours of labor of employees, and by otherwise eliminating the causes of strikes and lockouts.

It is then alleged that all of the plaintiffs are engaged in the business of producing bituminous coal for distribution and sale in interstate commerce, and in the con-

duct of such business are subject to Federal regulation to the extent and in the manner provided by the Code in Section 4 of the said Bituminous Coal Conservation Act.

It is then alleged that the Bituminous Coal Conservation Act of 1935 exempts the plaintiffs from ninety per cent of the tax imposed by said Act if they file an acceptance of the Code to be formulated under said Act, and they would be thus exempted so long as they remain members of the Code, and if their membership were revoked, such revocation would be subject to judicial review before becoming effective. It is further alleged that the acceptance of the Code would not preclude or estop any acceptor from contesting the constitutionality of any Code provision, or its invalidity as applied to him.

It is then alleged that the acceptance of the Code to avoid the payment of ninety per cent of the tax by any or all of the plaintiffs would not affect any of their constitutional rights, and any or all of the plaintiffs could after the acceptance of said Act protect all their rights by complete administrative or judicial remedy.

It is then alleged that the payment of ten per cent of the tax as provided under the bill, or the acceptance of the Code as provided under the Act, would not cause the plaintiffs, or any of them, any injury, irreparable or otherwise.

It is then alleged that the plaintiffs have voluntarily and arbitrarily refused to file their acceptance of the Code referred to, and under such circumstances none of them, are entitled to the relief prayed for in their petition.

It is then alleged that the Bill of Complaint of the plaintiffs is premature, since no tax is yet in effect.

It is then alleged that the Court is without jurisdiction to grant the relief prayed for in the original petition because it seeks an injunction to restrain the collection of a tax, which is prohibited under Section 3224 of the Revised Statutes of the United States, U. S. C. A. Title 26, Section 154.

The second suit is an action (Equity #997) instituted by C. H. Clark, a citizen of the Commonwealth of Kentucky, residing at Louisville in the Western District, a stockholder and a member of the Board of Directors of the defendant corporation, the R. C. Tway Coal Company. This defendant is one of the plaintiffs in Action #996. It is alleged in the Bill that it is engaged in the business of mining and producing bituminous coal from its mines located in Harlan County, Kentucky, and selling the coal so produced. Its affairs are conducted by a

Board of Directors elected by the stockholders. R. C. Tway and L. A. Shafer are made parties defendant, and it is stated that each of them is a stockholder and director, and together with the plaintiff constitute the Board of Directors of the defendant corporation.

It is alleged that the suit is in Equity, is of a civil nature, arising under the Constitution and laws of the United States, and involves the validity, construction, application and enforcement of the Act of Congress approved August 30, 1935, known as the "Bituminous Coal Conservation Act of 1935." The collusiveness of the action is denied, and it is alleged that the matter in controversy exceeds the sum of Three Thousand Dollars.

It is further alleged that the Act referred to recognizes and declares that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected with a national public interest, and that the general welfare of the nation requires that the bituminous coal industry shall be regulated as provided in the Act referred to in the petition, and that the production of such coal and its distribution directly bear upon and directly effect interstate commerce.

The plaintiff then sets out the provisions of the Act in detail, including the provision or the imposition of a monthly tax of fifteen per cent of the sale price at the mine when removed therefrom; if the defendant fails to accept the Code referred to in the Act. He then sets out that the Congress has the constitutional power to provide for all the things directed to be done in the regulation of the bituminous coal business as provided in the Act.

The plaintiff then alleges that notwithstanding the validity of the regulatory Act, that the majority of the Board of Directors of the corporate defendant, prior to September 10, 1935, over his protest and contrary to his wishes, concluded that the Act of Congress referred to was unconstitutional and that the defendant would not comply with any of its terms, and immediately after the action of said Board of Directors, he requested the Board in writing to reconsider its action, to accept the provisions of the Act, sign the Code as provided, and in response to his demand the Board of Directors of the corporation held a special meeting, and at said meeting, over his protest, reaffirmed their former action and spread on the minutes of the meeting a resolution to not comply with any provisions of said Act because of its unconstitutionality.

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Plaintiff then states that a special meeting of the stockholders of the corporate defendant was held, and he appealed to them to accept the provisions of the Act referred to, and over his protest the stockholders of the corporate defendant, excluding himself, unanimously voted to not accept the provisions of said Act or any part thereof, and by resolution duly spread on the minutes of the meeting so declared.

Plaintiff states that by reason of the corporate defendant refusing to accept the provisions of the Bituminous Coal Code that it subjects itself to a tax of fifteen per cent on the sale price of the coal mined and produced by it, as provided by Section 3 of the Act, and that the profit realized by the corporate defendant for many years past and at the present time, and as he believes, in the future, will not be in excess of five per cent of the sale price of the coal mined and sold, and that the tax of fifteen per cent imposed upon the corporate defendant for its failure to accept the Code will have to be paid out of its capital assets, which will result in a disastrous loss to the company and ultimately lead to its bankruptcy and the entire loss and destruction of the value of plaintiff's stock in the corporate defendant.

He further states that under the provisions of the Act, the corporate defendant is subject to a fine not exceeding Ten Thousand Dollars for each failure to report and pay the taxes provided in said Act, and the imposition of fines on the corporate defendant will also deplete the assets of said defendant, which would reduce the value of the stockholders' shares in said company,

Plaintiff states that in view of the facts alleged in the petition, it is the duty of the corporate defendant, in the proper performance of its corporate functions, to accept and operate under all the provisions of the Bituminous Coal Code, and that it is the duty of the individual defendants, Tway and Shafer, to join with the plaintiff, as Directors of the corporate defendant to cause it to accept the said Code and operate under its provisions, and that their failure to do so will work irreparable damage and injury to the corporate defendant, and to the plaintiff and stockholders, and that he is without remedy, except in this Court sitting as a Court of Equity.

Plaintiff asks the Court to adjudge that it is the duty of the corporate defendant, and its officers and directors, to accept the provisions of the Act of Congress, approved August 30, 1935, known as the "Bituminous Coal Conservation Act," and use its equity powers to compel the

corporate defendant and its officers to take all steps necessary to comply with said Act.

The plaintiff invited the District Attorney for the Western District of Kentucky to appear in the proceeding instituted by him, and aid and assist him and his attorneys in sustaining the constitutionality of the Act referred to in the petition, and the District Attorney filed a brief amicus curiae.

The plaintiff and defendants filed a stipulation in the action, in which it was stipulated and agreed that if the matters dealt with in Section 4 of the Bituminous Coal Code and the provisions set out in Paragraph 3 of said section were matters within the competency of Congress under the Constitution, and if Congress had the power to impose the fifteen per cent tax on the producers who refuse to accept and operate under the Code provided under Section 4 and to exempt producers accepting the provisions of the Code from payment of ninety per cent of such tax, it would be an abuse of the corporate functions of the company and of the powers vested in the Directors to conduct the affairs of the corporation, to refuse to accept said Code and operate thereunder because of the additional burden of taxation on the corporation.

It was stipulated that the plaintiff was authorized to invite the Department of Justice of the United States, and the United States Attorney for the Western District of Kentucky to appear and defend the constitutionality of the Bituminous Coal Conservation Act of 1935, but this consent was not to be construed as an agreement that the invited parties should control the progress of the action or unduly delay its decision by the Court.

A supplemental stipulation was filed, in which the parties stipulated that bituminous coal was used in generating energy for light, heat and power in all parts of the United States, and that substantially forty-five per cent of the total energy used in the United States was produced from the use of such coal.

It was further stipulated that eighty-six per cent of such coal was transported in interstate commerce from the place of production to destination by rail, and that only fourteen per cent of such coal was consumed in the State where produced. It was also stipulated that eighteen per cent of the gross freight revenues of the railroads engaged in interstate commerce was realized from the transportation of bituminous coal, and that approximately twenty per cent of the total annual pro-

duction of bituminous coal in the United States was used for fuel by railroads engaged in interstate commerce.

It was further stipulated that approximately 450,000 men were employed in the United States in the mining of bituminous coal, and that approximately sixty per cent of the cost of producing such coal was represented by wages paid to them.

It was further stipulated that the United States District Attorney for the Western District of Kentucky had been invited to appear in said cause and present any additional facts which he deemed pertinent to a decision of said cause, but that said Attorney had not offered or produced any evidence.

The defendants, after admitting the right of the plaintiff to maintain this action, moved its dismissal for the following reasons:

> "1. Because Congress, under the Constitution of the United States, has no jurisdiction over and no power to legislate upon the matters required by Section 4 of the Act to be embraced in the Bituminous Coal Code therein required to be formulated, and particularly because the fixing of minimum and maximum prices of coal free on board transportation facilities at the mines; the requirement that coal shall be sold by producers to all customers similarly circumstanced at the same price; the regulation and control of contracts for the sale of coal; and the regulation of the relations between producers and their employees in the production of coal, including the regulation and fixing of wages and hours of service, as authorized in part III of section 4, are each and all matters not within the competency of Congress, under the Constitution of the United States, and the attempted regulation by Congress of the above enumerated matters is violative of the due process clause of the Fifth Amendment to the Constitution of the United States, and of the reserved rights of the States and the people, secured to them by the Tenth Amendment thereof.
>
> "2. Because sections 3 and 9 of the Act, insofar as they purport to impose upon those producers of bituminous coal who refuse to accept and operate under the provisions of section 4 of the Act, and of the code formulated thereunder, a tax equal to fifteen per cent of the sale price at the mine of the coal produced by them, is not a good faith exer-

cise of the taxing power conferred upon Congress by clause 1, section 8, article 1, of the Constitution of the United States, but is an unconstitutional attempt on the part of Congress, under the guise of taxation, to coerce all producers of bituminous coal into accepting and operating under the Bituminous Coal Code provided for by section 4 of the Act, and to punish those producers of bituminous coal who are unwilling to surrender their constitutional right to conduct their business free of unconstitutional interference and regulation by Congress; and the imposition of such penalty operates to deprive producers who refuse to accept the provisions of the code of their property without due process of law, in violation of the Fifth Amendment, and is an unconstitutional invasion of the rights of such producers, reserved to them by the Tenth Amendment to the Constitution of the United States.

"3. Because section 4 of the Act undertakes to delegate legislative power to the National Bituminous Coal Commission, and to the other agencies created by the Act.

"4. Because the tax attempted to be imposed upon those producers who refuse to accept and operate under the provisions of the code required to be formulated under section 4 of the Act is arbitrary, capricious and confiscatory, and was deliberately intended by Congress to be confiscatory."

Equity No. 808 is a petition filed by John N. Backall and Sterling S. Lanier, Jr., this Court's receivers appointed in the case of Baltimore Trust Company v. Norton Coal Mining Company, engaged in the business of operating coal properties in the Western Kentucky coal field, and in producing and marketing bituminous coal. The petitioners, after setting out their operating losses and the impossibility of paying a tax of fifteen per cent on the sale price per ton on the coal mined, alleged substantially the same facts as stated by the plaintiff in Action No. 996, and in defendants' answer in that same action, and further said they were unable to decide what course of action they should pursue under said facts and their unwillingness to assume responsibility for a decision, and requested the Court to advise them as to whether or not they should ignore said Act or comply with its provisions.

All of these actions have been submitted to the Court for final decision.

Opinion

The parties to Actions No. 996 and No. 997 have filed stipulations of fact and introduced oral testimony concerning factual matters considered by the Congress in passing the Legislation which it is now claimed is unconstitutional. Their reason for seeking the aid of testimony in passing on the Congressional power to legislate on this subject is said to be supported by the opinion of the Supreme Court in Borden's Company v. Baldwin, 293 U. S. 194, 213. An examination of this case shows that the matter before the Court was the validity of a Statute of the State of New York, referred to as the "New York Milk Control Law" of April 10, 1933, authorizing the Milk Control Board to fix minimum prices for sales of fluid milk in bottles by milk dealers to stores in a city of more than one million inhabitants, establishing a differential of one cent a quart in favor of dealers not having a well advertised trade name.

The Court in that case said that where a legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and findings, and the Supreme Court sent the case back to the lower Court for a final hearing upon pleadings and proof, with directions that the facts should be found and conclusions of law stated as required by Equity Rule 70½.

This case turned on the administration of the Act in the construction that the Milk Control Board had placed on the phrase "well advertised trade name," and its application to the appellant. It did not involve, except indirectly, the constitutionality of the Act under which the Milk Control Board made its classification.

I have followed the wishes of counsel in putting into the record factual matters as far as it is concerned, but in writing this opinion I have assumed that this Court is without power to hear evidence or find facts upon the constitutionality of the Congressional Act here in question.

Where a proceeding directly attacks an Act of Congress, as unconstitutional as contradistinguished from constitutional rights being invaded by the administration of the Act, it seems to me a Court would be treading on dangerous ground to attempt to go into a factual field in determining its constitutionality. The effect of evidence in such proceeding is, of course, a collateral attack upon the legislative inquiry, judgment and declaration (that is to impeach it).

Opinion

The Congress has already investigated the facts as a basis for its action. If its findings may be impeached by the testimony of opinion witnesses, the Act might be found to be constitutional in one case and unconstitutional in another, depending on the testimony. As many conclusions might be reached as to constitutionality as there might be Judges, or upon such facts as ingenuity might suggest as matters of opinion or actual facts in evidence.

The Courts, so long as they recognize the doctrine of separation of Governmental powers, which is fundamental under our system, will not attempt to exercise the power of another branch. Judges will be careful to observe the ideal expressed by the letter and spirit of the Constitution to avoid encroachment upon other departments, and will be quick to sustain each in the exercise of its legitimate function, and so the rule prevails that every inquiry into the validity of a legislative act is approached with the presumption that the Congress observed the Constitution, and when the validity of an act depends upon the existence of certain facts, the legislative determination will be conclusive on the Courts, unless the contrary is shown by facts which the Court may judicially notice. If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which the Court can take judicial notice, then the Act must stand. Soon Hing v. Crowley, 113 U. S. 703, 711; Minnesota v. Barber, 136 U. S. 320; New Orleans v. Warner, 175 U. S. 416; Angle v. Chicago, etc., Railway Co., 151 U. S. 27.

The following fact finding investigations into the conditions under which bituminous coal is produced, distributed and marketed throughout the United States have been held or authorized by Congress:

Hearings before the Committee on Manufactures of the Senate on Shortage of Coal (65th Cong., 2nd Sess., 1918);

Hearings before the Committee on Interstate Commerce of the Senate on Increased Price of Coal (66th Cong., 1st Sess., 1919, 1920, 1921);

Hearings before the Committee on Reconstruction and Production of the Senate on Coal and Transportation (66th Cong., 3rd Sess., 1920, 1921);

Hearings before the Committee on Education and Labor of the Senate on Conditions in the West Virginia Coal Fields (67th Cong., 1st Sess., 1921, 1922);

Hearings before the Committee on Labor of the House of Representatives on Labor Conditions in the Coal Industry (67th Cong., 2nd Sess., 1922);

Report of the United States Coal Commission pursuant to the Act of September 22, 1922, published in 1925;

Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Coal Legislation (69th Cong., 1st Sess., 1926);

Hearings before the Committee on Interstate Commerce of the Senate on Conditions in the Coal Fields of Pennsylvania, West Virginia and Ohio (70th Cong., 1st Sess., 1928);

Hearings before the Committee on Interstate Commerce of the Senate on Proposed Bituminous Coal Legislation (70th Cong., 2nd Sess., 1929);

Hearings before the Committee on Mines and Mining of the Senate on the Creation of Bituminous Coal Commission (72nd Cong., 1st Sess., 1932);

Hearings before the Committee on Interstate Commerce of the Senate on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935);

Hearings before the Committee on Ways and Means of the House of Representatives on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935).

All of the ultimate facts shown in these reports are presumed to have been considered by the Congress before the passage of the Act in question, and this Court may consider them as well as all other facts of which it may take judicial notice in passing on the validity of this Act. Board of Trade v. Olsen, 262 U. S. 1, 43.

Based on these reports and matters of common knowledge, the following facts were before the Congress at the time of the passage of the Act here involved:

More important than winds and water for the production of power and of heat is coal mining of all kinds. Mechanical transportation, manufacturing, and domestic heating all largely depend upon coal. Water power and oil have in a recent age relieved somewhat the burden upon coal, but it still is, and will long continue to be, the principal source of energy in the United States. It is the most valuable mineral in all the world. It is, with oil, one of the twins of Black Gold. The utili-

zation of coal awaited the development of the steam engine, but when James Watt developed the latter, it, together with coal, brought on an industrial revolution which changed the course of history and the life of mankind.

Coal not only heats our homes and public buildings, provides power for railroads and steamships, and keeps alive the great furnaces that transform iron ore into pig iron, but it enters into every-day living in many ways, for coke, gas, ammonia, and tar are all derived from coal, and they in turn have derivitives that are now considered indispensable to modern civilization. Sixty-three valuable chemical by-products are obtained from coal. This mineral is an indispensable requisite to our continued progress.

The production of bituminous coal by States, in millions of tons per annum, is approximately as follows: Pennsylvania 140, West Virginia 124, Illinois 68, Kentucky 54, Ohio 29, Indiana 22, Alabama 22, Virginia 12. Twenty other states produce bituminous coal in small quantities, but the eight States above mentioned produce the major part. All of the States of the Union use bituminous coal in large quantities, and it is the principal article in freight tonnage moved by interstate railroads. It is the largest single source of gross freight revenue to these roads, and is also the principal source of power.

The paramount importance of the bituminous coal mining industry in the economic and social life of this country cannot be denied. With the exception of agriculture, it employs more men than any other single industry in the United States. It is the foundation of our iron and steel, shipbuilding, and engineering trades, and, indeed, of our whole industrial life.

The industry has a human as well as a technical side. The risk and uncertainties of mining, the importance of the industry, and the national welfare combine to make the life of the miner a matter of public concern.

From the days of the Molly Maguires in 1875, to the present time, the Bituminous Industry has been the theater of unrest which constantly gives rise to stoppages of work in the industry and occasionally develops into labor disputes on a national scale. The announcement of strikes is sometimes made long in advance of the contemplated event, and large sums of working capital of railroads engaged in interstate commerce, and manufacturers producing products entering into such commerce are invested in reserve supplies of coal, and the

storage thereof displaces other necessary appliances and utensils used by the carrier, and the product of the manufacturer, and in addition adds to the burden of both the carrier and the manufacturer by the use of unnecessary capital.

The miners seek to make a wage scale applying to producing coal areas in more than one State, and the scale of wages in one State affects the production and movement of coal in another State with a different wage scale.

Mining is recognized as one of the most hazardous occupations of man, and it has exacted its toll in thousands of deaths and many more injuries in comparatively few years. New methods of extraction, and the use of labor saving appliances have greatly increased the output in tons per man. Most of the coal reserves of the United States in production are located where mining is the only gainful occupation, and when slack work comes, those thrown out of employment can find no other occupation in which subsistence may be had. The high number per thousand of population on the relief rolls in the mining areas of the United States compared with the other sections of the country is impressive testimony of the vital interest the Government has in the rehabilitation and stabilization of the coal industry.

No other industry in the United States has had the prolonged intimate and painstaking study of its conditions as the Bituminous Coal Industry. The Fuel Production Committee of 1917, The Fuel Administrator from 1917 to 1919, the Bituminous Coal Commission of 1921, The Federal Fact Finding Commission, not to mention the various Congressional and State Legislative Committees, have all examined the ills of the mining industry and fully reported on them. The average earnings of the miner have been in constant decline since 1922, and generally have not been sufficient to maintain him and his family above the recognized line of subsistence. For more than ten years this industry has been in chaos. There have been misunderstandings without number between the operator and the miner. No other industry has caused so much public anxiety, and the disorders in it have vitally affected the interstate steam transportation system of the country and its repercussions have been felt in other industries.

The operators and owners of mines, shortly after the close of the War, fell upon hard times and profits practically vanished. It was not possible to lower freight

rates affiecting the industry. The only place where the cost of production could be decreased was in wages, and thus came a period, which still continues, of lower standards of living for the miners, and the loss of an economic wage.

The business of coal mining, that is to say bringing coal from the seam to the surface and preparing it for sale by screening or washing, is not carried on in isolation from other businesses. It is usually sold to be transported in interstate commerce before mining is commenced, and the production thereof is closely associated with its utilization in other industries not only using it for the production of power, but also its by-products in the manufacture of many articles that are absolutely essential to the comfort and convenience of the American people.

The production of bituminous coal was greatly expanded during the period of the late war, and at the conclusion of peace, the mining area had been increased far beyond the needs of consumers, and capital invested in the business became frozen. The difficulties of the industry were further increased by the substitution of oil, natural gas and water power for the production of energy. Bankruptcies of concerns engaged in the business have clogged the Court dockets, and it has been a prolific source of equity receiverships. Reorganizations authorized under the amended bankruptcy acts have been of no substantial benefit to the coal industry. The Norton Coal Company, heretofore referred to in this opinion, has been in receivership in this Court for an undue period, and it is impossible to find a purchaser for its properties at any substantial price, although at one time it was a highly profitable concern and now owns a large acreage of bituminous coal readily accessible for mining. The unfavorable condition in the coal industry, due to over-production and over-capitalization, has led to many unfair trade practices. An illustration of some of them is what is usually referred to as "distress coal," which is the production of different sizes of coal for which there is no market in order to obtain a marketable size. Because of a lack of storage facilities at the mines, the distress coal is placed on cars at the producers' tracks, which become so congested that production must be stopped or cars moved, which is done by sending the unsold cars to billing points on consignment, which depresses the price of other coal at the point of consigned destination. Often distress coal is not marketable at any price after being shipped

on consignment. Demurrage charges accumulate on standing cars, and interstate transportation facilities are thrown out of movable use. "Pyramiding" of coal is another unfair trade practice, which occurs when a producer authorizes several persons to sell the same coal, and they in turn offer it to other dealers, which causes the coal to compete with itself in the market, resulting in abnormal and destructive competition.

Other unfair trade practices could be cited, but these are sufficient to illustrate the point.

The bituminous coal fields of the United States in production are widely separated. The greater part of them are in the Eastern and Middle States. The West Coast must depend for its supply on long stretches of interstate or water transportation.

It may be said that if the supply of bituminous coal were suddenly cut off, many manufacturing plants would shut down, trains stop, and steamships be helpless.

It is claimed by the defendant in Action No. 996, that it is premature because the tax or penalty which the plaintiffs claim they will be required to pay is not assessable or due until January, 1936, and on the further ground that before the defendant, as Collector, has any authority to collect these taxes or penalties, they must first be assessed by the Commissioner of Internal Revenue.

While the taxes are not payable until January, 1936, they are determined on a basis of coal mined after November 1, 1935, and prudent business management would require each of the plaintiffs to begin maintaining a reserve for the taxes as they accrue. The sums due would enter into the cost of coal produced, and if the Act here in question is constitutional and the plaintiffs resist it and refuse to comply with its terms, each would add the tax to the cost of coal produced if a market could be found with the addition.

It is provided in Section 7 of the Act that all the provisions of the law, including penalties and refunds relating to the collection and disposition of internal revenue taxes, shall in so far as applicable and not inconsistent, be applied to taxes imposed under the Act.

R. S. 3164, U. S. C. A. 26, Section 26, provides it shall be the duty of every Collector of Internal Revenue having knowledge of any wilful violation of any law of the United States relating to the Revenue, within thirty days of the coming into possession of such knowledge to file with the District Attorney of the District in which any fine, penalty or forfeiture may be incurred, a statement

of all the facts and circumstances of the case within his knowledge.

Under the provisions of R. S. 838, U. S. C. A. 28, Section 486, it is made the duty of the District Attorney to collect the fine or penalty reported to him by the Collector. Various other provisions of the Internal Revenue Law, unnecessary to cite here, require the Collector to diligently inquire into all tax delinquencies and take prompt action to assess and collect all taxes found to be due and unpaid in his district.

A court of equity acts before injury is done. All that is necessary to determine is the impending damage. This action is not premature. Pierce v. Society of Sisters, 268 U. S. 510; Hill v. Wallace, 259 U. S. 44; Nashville C. & St. L. Railway Co. v. Wallace, 288 U. S. 251; Vicksburg Waterworks Company v. Vicksburg, 185 U. S. 65; United States v. Murphy, 264 F. 843; Ex Parte Young, 209 U. S. 123; City Bank Farmers Trust Company v. Schnader, 291 U. S. 24.

It is also contended by the defendant that Section 3224 of the Revised Statutes, U. S. C. A. 26, Section 154, prevents this Court from issuing an injunction against the defendant, although all the facts alleged in plaintiffs' petition are true. It is provided in this Section that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court. It has been many times decided that this statute is inapplicable if extraordinary circumstances exist bringing the case within the acknowledged head of equity jurisdiction, and it is prohibitive of this proceeding unless such extraordinary circumstances have been shown.

The plaintiffs have introduced evidence as to each of them sustaining the allegations of the petition that they are wholly unable to continue in business if compelled to pay fifteen per cent of the sale price per ton on all the coal produced and mined by them. The defendant responds to this contention by pointing out that the payment of one and one-half per cent of the sale price per ton on coal mined would be no burden, and the plaintiffs admit this sum in taxes could be borne by each of them without hardship, but insist that they, and each of them, are entitled to have the constitutionality of the Act involved determined by the Courts of the land before being compelled to accept its terms.

It was the undoubted purpose of the Congress in providing for the fifteen per cent per ton tax to use it as a weapon to force persons within the terms of the Act to accept its provisions, and thereafter afford them the

remedy of contesting the matter in Court. It, therefore, comes to the question of whether or not the plaintiffs would lose any substantial rights by accepting the Code. If any one of them would lose either money or a substantial property right by the payment of the tax of one and one-half per cent and acceptance of the Code, then Section 3224 R. S. is not applicable under the principle laid down in Hill v. Wallace, supra; and the plaintiffs would be entitled to the relief, as decreed in the case of Miller v. Nut Margarine Company, 284 U. S. 498.

As heretofore pointed out, the only provision for refund of taxes under this Act is by reference to other provisions of the law for the refundment of Internal Revenue taxes. Four different statutory provisions are found for refundment, as follows: 26 U. S. C. A. 149, R. S. 3220; 26 U. S. C. A. 1065, 43 Stat. 1115; 26 U. S. C. A. 1120, 44 Stat. 84; 7 U. S. C. A. 615, 48 Stat. 973. These sections have varying periods of limitation, and one of them provides that the taxpayer shall show satisfactory evidence that he has not passed the tax on to the consumer. It will thus be seen there is an uncertainty in the law as to what particular refunding statute the plaintiffs should follow in making application for refund.

It is provided in Section 3 of the Act here in question, "no producer shall by reason of his acceptance of the Code provided for in Section 4, or the drawback of taxes provided in Section 3 of this Act, be precluded or estopped from contesting the constitutionality of any provision of said Code or its validity as applicable to such producer." It will be noted that this provision of the Statute provides only the waiver specifically to the Code provisions of the Act and no others. It is not as broad provision of waiver of estoppel by the Government as would seem without close examination.

If a producer accepts the Act until the constitutionality of the Code provisions are settled in Court, he is subjected to its provisions as to prices, wage scale, and prohibited from following certain trade practices which otherwise might not be unlawful. From these things he might sustain a substantial loss for which no recovery is provided in the Act.

It would be a senseless sort of procedure to say that he could accept the provisions of the Act, and simultaneously therewith file suit in Court to test its constitutionality. R. S. 3224 is not applicable to this suit.

This section should not be extended by implication. The Courts are better equipped to construe acts of the

Congress than administrative officers. The Judge is identified, and trained in construing statutes. His hearings are conducted in public, and his judgment is determined by the impartial application of principles which are known and established. All persons to the controversy are fully and fairly heard. In other words, the decision of a Court is in every important respect sharply contrasted with administrative conclusions, however benevolent the executive administrator may be.

Prompt judicial determination of the constitutionality of an Act leads to its quick acceptance by those to whom applicable. Delay of determination through administrative process makes uncertain the rights of the citizen and difficult administration of the law.

The District Attorney and the Attorney-General's office filed a brief amicus curiae in Action #997, and insisted that this Court had no jurisdiction because there was no case or controversy between the parties, and further the constitutionality of the Act could not be properly decided due to the lack of evidence.

As was heretofore pointed out in the statement of the case, it was alleged in the petition that the action was not collusive. The District Attorney and the Attorney-General were invited to come into the case and tender any evidence germane to the question. This invitation was declined. Lack of good faith on the part of litigants to a law suit cannot be raised by an amicus curiae. If the record fails to show collusion between the parties, such friend of the Court must take the record as he finds it.

The District Attorney and the Collector of Internal Revenue were proper, but not necessary, parties to this action. The Court would have permitted either of them to become parties had they so desired, and as such, of course, they could have produced any evidence showing collusiveness to oust the Court of jurisdiction that they wished, and it was their duty to have raised the question in that form rather than by collateral interjection.

There is nothing in the record to show collusion. The Court is not ready to assume that any officer of a company coming under the provisions of the Act here in question would not wish to comply with its terms. According to the public press, many of the producers of bituminous coal, in fact the majority of them, have accepted this Act.

There is also nothing to show that the plaintiff, C. H. Clark, is not prosecuting his action in good faith. This Court has jurisdiction of the action. Re Reisenberg, 208

U. S. 90; Hill v. Wallace, 259 U. S. 544; Brushaber v. Union Pacific R. Co., 240 U. S. 1; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429; Smith v. Kansas City Title & Trust Co., 259 U. S. 180; Cotting v. Godard, 183 U. S. 79; Dodge v. Woolsey, 18 How. 331; Dickerman v. Northern Trust Company, 176 U. S. 181; Harris v. Brown, 6 F. (2) 922; Black & White Taxicab & Transfer Company v. Brown & Yellow Taxicab & Transfer Company, 276 U. S. 518; Blair v. Chicago, 201 U. S. 400; May Hosiery Mills v. United States District Court, 64 F. (2) 450.

As we have heretofore pointed out, we do not believe the Court is authorized to receive evidence to aid it in determining the constitutionality of the Act involved, and for that reason the second point raised by the amicus curiae is without merit. Action #997 presents both a cause of action and a justifiable controversy.

In view of the conclusions I have heretofore expressed, it now becomes my duty to pass on the constitutionality of the Act. Its opponents attack it broadly on the following grounds:

1. Because it violates the due process clause of the Fifth Amendment to the Constitution, and the reserve rights of the States and the people under the Tenth Amendment.

2. Because it confers legislative power on the National Bituminous Coal Commission and other agencies created by the Act.

There are two approaches to the determination of the constitutionality of a statute. One is to measure it by the decisions of the Supreme Court on acts somewhat similar to the one under consideration; and the other, to directly test it by the provisions of the Constitution, regardless of any decisions of the Supreme Court. The latter course should be pursued first in every case, because each act involves a different subject matter from any previous one. In Schechter v. United States, 295 U. S. 546, the Court said:

> "In determining how far the Federal Government may go in controlling intra-state transactions upon the ground they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as the individual cases arise, but the distinction is clear in principle."

Unless this distinction is kept in mind, the consideration of the decisions of the Supreme Court will only lead to confusion.

Many acts involving interstate commerce are somewhat similar to the Bituminous Conservation Act, but the relationship is only fragmentary. The Supreme Court has been careful to state, in many cases, that its decision is only applicable to the particular act under consideration. The Court is committed to the doctrine that the Constitution is a live and vital instrument, and is not static. It speaks of the age when written, more than a hundred years ago. The Court expounds it in the language of its own age, holding fast to the old words and powers, but expounding them to keep pace with the expansion of our country, its citizens, its enterprises and industries, and our rapidly growing civilization.

The Act here in question is not to be tested by the Court's decision on some previous act, which was identical with a part of this one. The whole is the sum of all the parts, but the affinity of the parts is not the affinity of the whole. Many illustrations of this are found in chemistry. Cotton and nitric acid, widely used commodities, separately are not dangerous, but when joined to form gun cotton, a deadly explosive is produced. Glycerine, a part of almost every soap used in every household, is a harmless product. Nitric acid, when used alone, is harmless, but when combined with glycerine produces nitro-glycerine, a powerful, deadly force. So it is in the business and economic world. Things standing alone do not affect the happiness or welfare of the people, but when combined produce political and social disaster. Keeping this principle in mind, the mining of coal alone may not affect interstate commerce, but combined with the work of the miner, the transportation and marketing thereof may become interstate commerce in its entirety.

The Constitution of the United States stands alone, and decisions of the Courts interpreting it do not alter it. In testing any Act of Congress by the terms of that instrument, a sensible and logical thing to do is to immediately go to the language of the document and to measure the Act in question by the basic rules of interpretation and not the decisions of the Supreme Court on some similar, but not related, Act to the one in question.

After this is done, then the decisions of the Court on similar acts will be helpful in testing the conclusion reached from the first investigation.

Opinion

The Constitution of the United States was ordained among other purposes to promote the general welfare, and one of the methods for so doing, as provided in Section 8, was to regulate commerce with foreign nations and among the several States, and with the Indian Tribes, and in order to make certain that this could be done, it empowered the Congress to make all laws which should be necessary and proper for carrying into execution the power specifically conferred, and all others vested by the Constitution in the Government of the United States, or any Department or officer thereof.

The most helpful rule for interpreting the Constitution is to look to the history of the times and examine the state of things existing when it was formed, and adopted. In applying this rule, we may look to conditions at the time of its adoption, the general spirit of the times, and the prevailing sentiment among the people. In doing this, reference may be made to historical facts and prior well-known practices and usages. Legal Tender Cases, 12 Wall. 47; Gibbons v. Ogden, 9 Wheat. 1; Rhode Island v. Massachusetts, 12 Pet. 657; Slaughterhouse Cases, 16 Wall. 36; Maxwell v. Dow, 176 U. S. 581.

The first effort of our people, after winning the War of Independence, to have a united government was by Articles of Confederation adopted in 1777. After ten years of government under this instrument, it was found that if the great purposes for which independence was sought were to survive and the nation grow, the States must surrender to a central government certain powers they had, and in response to the people's demand, the Constitution of the United States was adopted in 1787.

It is clear from a consideration of the history of the times, the adoption of the Constitution, and the objects to be accomplished, that the people of the States intended to surrender all the rights they had to promote the general welfare that could not be done by the States acting independently. If this broad purpose is kept in mind, dictionary definitions of words will be less potent in interpreting the Constitution, and there will be less case matching when Courts are called on to perform this duty.

The Congress should first determine if the act proposed is in the interest of the public welfare; second, can the States acting independently accomplish the result; third, if not, should the Central Government take action; and, fourth, search the Constitution for authority to carry into statutory form the demand of the people for Governmental action. If State action is impotent,

Federal action is imperative if public necessities demand.

The facts, as heretofore shown, clearly prove that the States acting alone are unable to rehabilitate the Bituminous Coal Mining Industry as it affects the people generally, the capital invested in the business, and the wage earner employed therein. Joint action of the States is imperative. The Congress should exercise whatever power it has, and if possible, the Courts should avoid constitutional barriers thereto.

Disordered commerce among the States contributed largely to the fall of the original Confederacy. It was soon found it was idle and visionary to suppose that the Government of the United States could continue to exist if the States retained the power to regulate commerce among them.

Washington, before the Convention met to adopt the Constitution, referring to the necessity of power to regulate commerce being lodged in the Central Government, said:

> "If the States individually attempt to regulate commerce, an abortion, or a many-headed monster would be the issue. If we consider ourselves, or wish to be considered by others, as a united people, why not adopt the measures which are characteristic of it and support the honor and dignity of one? If we are afraid to trust one another under qualified powers, there is an end of the union."—Rives' Madison, p. 60.

The Constitution is an enumeration of powers and contains no definitions. The defining is left to the Congress, and if its definition is without basis in fact, the Courts may negatively disregard the Congressional definition.

It does no violence to the Constitution to say the power to regulate commerce among the States gives Congress the power to regulate that which regulates interstate commerce.

If a mass of things directly affect interstate commerce, it would seem within the realm of reason that Congress could take hold of any part of the mass when it began to move to the union of the whole.

When the coal operator contracts his coal in advance of production, to be transported in interstate commerce, and the miner begins to dig the coal and lift it to the surface of the earth, there to be put in the car on the loading tracks and a part of it to be used to move the locomotive that carries the coal, it would seem reasonable

that under the power to regulate commerce the Congress would have power to legislate concerning the industry at the beginning of the movement that was to continue uninterrupted until ultimate delivery to a consumer or purchaser. Unless this be so, Congressional power to regulate commerce is confined exclusively to the vehicle that moves the product.

With these general observations, we now turn to the decisions of the Supreme Court as to what so affects interstate commerce as to authorize legislative action.

In Stafford v. Wallace, 258 U. S. 495, the Court said:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it."

In Chicago Board of Trade v. Olsen, 262 U. S. 1, the Court said:

> "In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation, and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein."

Compare, Hill v. Wallace, 259 U. S. 44; Coronado Coal Co. v. United Mine Workers, 268 U. S. 295; United Mine Workers v. Red Jacket Consolidated Coal & Coke Co., 18 F. (2d) 839, (C. C. A. 4th); Southern Railway Co. v. United States, 222 U. S. 20; Second Employers' Liability Cases, 223 U. S. 1; Swift & Company v. United States, 196 U. S. 375; Tagg Bros. & Moorhead v. United States, 280 U. S. 420; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 9; In Re Debs, 158 U. S. 591.

The cases relied on by the defendant in Action #997, and cited on pages 12 to 15 of the brief, would seem from some expressions therein to support defendant's contention that the regulatory Act here involved does not find support in the commerce clause of the Constitution, but the laws discussed in these opinions were entirely different from the one here involved, and the principles announced by the Court in each of them only fragments of what we have here to decide.

Opinion

The Congress found, as a fact, in Section 1 of the Act here involved, that the production of bituminous coal and its distribution bear upon and directly affect interstate commerce and render regulation thereof necessary for its protection. Notwithstanding this solemn declaration by the Congress, the opponents of the Act insist that the Court should strike it down.

The three pillars of constitutional government standing and recognized by the people of the United States, are the separation of powers, and when any one of the three invade the field of the other, there is an undermining of the very foundation of our system of Government, and if persisted in, we will be destroyed.

As I have heretofore pointed out, there have been twelve investigations of the condition of the Bituminous Coal Industry and its effect on interstate commerce, and the general welfare since 1922. It cannot be said that the Congress did not investigate fully on the subject before its declarations were made. It is a delicate task for the Judiciary to interfere with the Legislative, and I know of no superior avenues of information it has that are not open to the Congress.

Judges are usually occupied with matters specifically brought to their attention, and it could hardly be said they have the current knowledge of the movement of the commerce stream that the Congress of the United States has, and certainly the Courts have no power to make a widespread investigation of things that affect interstate commerce. What affects interstate commerce is a question of fact. Commerce is a moving stream, rising, falling and changing its course with the progress of civilization, and what affects it in one generation may not in another.

The Congress has the power within its field to find facts and define terms as well as the Courts. In passing on the constitutionality of an Act, the Court does not sit as a reviewer of the facts before Congress that prompted it to take legislative action, and when it has found and declared what the facts are and defined what the thing is, and legislated on the subject, the Court in undertaking to overthrow the Act is arrogating to itself the powers of a branch of the Government which it does not have. The facts of which the Court may take judicial notice, and the ultimate facts as shown in the hearings before the Congress are some evidence of its declaration that the Bituminous Coal Industry as now conducted affects interstate commerce, and this being true, the Court is without power to substitute a different judgment

for that of Congress regardless of its opinion as to the wisdom of the legislation.

The opponents of the Act content themselves with citing definitions found in Court opinions defining interstate commerce, but none of the Acts involved in the cases were similar to the one here under consideration, and to that extent citations are of no value to me in passing on this question.

In the case of Block v. Hirsh, 256 U. S. 135, the Court said:

> "No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one may not be held conclusive by the Courts. * * * But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect."

In the case of Radice v. New York, 264 U. S. 294, the Court said:

> "Where the constitutional validity of a Statute depends upon the existence of facts, Courts must be cautious about reaching a conclusion respecting them, contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the Judge to set up his opinion in respect to it against the opinion of the law-maker."

Compare: Holden v. Hardy, 169 U. S. 366; Miller v. Oregon, 208 U. S. 412.

It is also claimed by the opponents of the Act that it is an attempt on the part of the Congress to exercise power reserved to the States. Of course, if it is the proper regulation of interstate commerce, then the States have no rights in the matter; and if the Act covers a joint field, a part of which the Federal Government could exercise, and a part the States, under such circumstances the Federal power becomes supreme. The point was made by counsel in Action #996, on oral argument, that a part of the plaintiffs business was intra-state and the act covered both coal mined for State consumption and that for use outside of the State.

The plaintiffs each conduct a single business. There is no separation of the intra from the interstate, and if the Congress were prohibited from legislating on the subject

on this account, neither State nor Federal authority could legislate on it, because by so doing each would invade the field of the other. Under such circumstances the right of the Federal Government becomes paramount, and as long as the plaintiffs do not separate their business as to the two sovereigns the Central Government can legislate on the whole subject.

Improved methods of transportation and communication or close association of communities have somewhat wiped out State lines whenever we come to consider political science as applied to Government. State isolation no longer exists regardless of legislation. The people of States now compete with each other where formerly only communities did. Nationally advertised products are so widely used throughout the country that States have no longer, by legislation, the power to regulate industries, however earnest their purpose.

To say that the production of products distributed on a national scale can be effectively controlled by the States is both constitutionally and economically absurd. To deny power in such a field to the national government is tantamount to saying there shall be no legislation concerning them.

We based our treatment on the Indians on Rosseau's principle "That no greater quantity should be occupied than is necessary for the subsistence of the occupiers." 8 Wheat. 543. The reverse of this doctrine is just as applicable to the States and when they fail or are unable to perform a public duty, the doctrine of States Rights should not be a barrier to the Federal Government rendering an essential service to the human race. The rights of every State, of every man and of every race must be limited, as all social liberty must be, by the co-equal rights of other States, and of other men brought into Government association with them.

Several States of the Union are great producers of bituminous coal, and in those States coal is to them what wheat is to the State of North Dakota. In the case of Lemke v. Farmers Grain Company, 258 U. S. 50, the court had before it an act of the State of North Dakota, referred to as the "North Dakota Grain Grading and Inspection Act," which was attacked on the ground that it regulated business engaged in interstate commerce, and for that reason was in conflict with the Federal Constitution. The Court, in holding it was and that the State had no power to legislate concerning it, said:

"That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogther so in principle. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282. In that case the facts disclose that a company organized in Tennessee and carrying on business there, went into Kentucky and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The state court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the State. This court rejected the conclusion of the state court, and held that the buying, no less than the selling, of grain under such circumstances was a part of interstate commerce, committed to national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce."

Compare: Foster Packing Company v. Hydel, 278 U. S. 1; Texas & Pacific Railway Company v. United States (Shreveport Case) 234 U. S. 342; Simpson, et al., v. Shepard (Minnesota Rate Case) 230 U. S. 352.

Section 1 of the Act declares that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected by a national public interest. Notwithstanding this declaration, the opponents of the Bill claim it is not true and that the Court is compelled to so decide. What I have heretofore said concerning the declaration in the Bill as to interstate commerce is equally applicable here, and this Court is without power to overthrow the findings of the Congress, because there is substantial basis for them. Even if the Court had power to determine the question for itself, there is a firm basis for the conclusion that bituminous coal is affected with a public interest. I will not again repeat the facts heretofore set out which show this to be true.

The great number of persons employed in the in-

dustry, its dangers and the wide use of its product have been a matter of concern to both the States and the Federal Government from the very beginning of mining in the United States. Living in communities apart from other people, the miners have acquired characteristics and terminology peculiar to themselves. The nature of their work in the silence and dark of the mines conduces to rumination. The long hours and arduous work have been preventive of leisure. Mining has always attracted the sympathy of the people to those who work underground. Any person who has read Wade's History of the Middle and Working Classes of England can but feel a deep interest in those people who go down into the bowels of the earth and bring out of it the fuel for most of the power that drives our industrial machines and provides heat that keeps us warm.

The miners' silent occupation, living apart, causes him to think of his hard lot and use every power at his command to improve his condition. Because of this, the industry has been one of frequent controversy between employer and employee. In recent years the highest officials of the United States, including the President have had to use their influence and power to avoid a nation-wide strike in the bituminous coal fields. These controversies have led to murders and disorders of all kinds. Every public official, including Federal Judges, in States where this industry is carried on, knows of these recurring disorders. To say it is not affected with the public interest is simply to ignore the facts.

The loss of life, the maimed and crippled, one of the price of conducting the business, has been the subject of legislation in every State where it is carried on. The poverty that pervades the coal field due to disorderly production and marketing, awakens the sympathy of all who live in the midst of it. The public burden of maintaining the miner who is out of employment, and his family, is one that affects every taxpayer in every community where the industry is carried on, and under present conditions this is a burden on the Government of the United States, because it now must contribute to the maintenance of the unemployed miner and his family.

Not only the economic, but the political future of the United States is greatly concerned with the condition of the mining industry. No people ever feel the want of work or the pinch of poverty for a long time without reaching out violent hands against their political institutions believing they may find in the change some relief from their distress.

The area of unlimited expansion on every side in the United States, a period where any one could reach out and obtain the desired goods provided for us by the hand that laid the foundations of the Earth, is drawing to a close. No one would believe or could conceive that the Founding Fathers, when they closed the book and put on the last page thereof, "The Constitution of the United States," did not place power in the Federal Government to conserve its natural resources. The mineral wealth stored in the earth can be used only once, and when the oil is pumped out, coal is the only remaining source of power except water.

From the sea, the mine, the forest, and the soil must be gathered everything that can sustain the life of man. From these must be conditioned forever, so far as we know, man's progress and his continued existence on earth. Our supply of bituminous coal is not inexhaustible. The use of it and its by-products becomes more important daily in our lives. We are rapidly exhausting the more accessible deposits of the mineral, and the future of mining means diminishing returns and higher prices.

Certainly no man would have the temerity to say that the Federal Government, because of lack of power, must idly stand by and see its forests cut down, its soil impoverished, and its minerals exhausted, resulting in destitute cities and an impoverished countryside. It may, likewise, be said that the framers of the Constitution did not intend for the Government to wait until its natural resources were practically exhausted before taking any steps to conserve them. The Supreme Court in Appalachian Coals, Inc., v. United States, 288 U. S. 344, 372, said:

> "When industry is grievously hurt, when concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."

In the case of Holden v. Hardy, supra, the Supreme Court had before it an Act of the Legislature of the State of Utah, which undertook to regulate the period of employment of workmen in all underground mines and smelters or other institutions for the reduction or refinement of ores. It was claimed that the Act was violative of the Fourteenth Amendment. The Court in the opinion reviewed generally the public laws enacted by the various States in reference to the control and regulation of min-

ing and sustained the Act. It has since that decision sustained other State legislation on the subject, notably Booth v. Indiana, 237 U. S. 396; Plymouth Coal Company v. Pennsylvania, 232 U. S. 540; Consolidated Coal Co. v. Illinois, 185 U. S. 207; Knoxville Iron Co. v. Harbison, 183 U. S. 21.

The mining of coal has been as much regulated by public law as the milk industry in the State of New York, and in the case of Nebbia v. New York, 291 U. S. 502, the Supreme Court held that the milk industry in that State, having been subjected to previous regulation, could be further regulated by a law of the State of New York controlling the sale price and distribution thereof. The Court said:

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.
>
> "Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the price charged by them."

The Supreme Court of Kansas, in the case of State, ex rel. Hopkins v. Howat, 109 Kan. 376, 198 Pac. 686, 25 A. L. R. 1210, 1242, well expressed why mining of coal is affected with a public interest, and said:

"The legislature was of the opinion the industries specified in Section 3 of the Act of 1920 are affected with a public interest, and so declared. The declaration did not make them so. Whether they are or not depends on their relation to public interest. Without presenting the facts, of which the court takes judicial knowledge, concerning the peculiar relation the product of the Kansas coal mines bears to the state's fuel supply, and without discussing further the peculiar conditions under which production is accomplished, the court concludes the business of producing coal bears an intimate relation to the public peace, good order, health, and welfare; that such business is affected with a public interest; and that such business may be regulated, to the end that reasonable continuity and efficiency of production may be maintained."

Coal being a national wasting asset of the United States, it is in the nation's interest that it should be used and worked to the best advantage. Under the power of Congress to levy taxes for the general welfare, it could, if deemed necessary, levy taxes and make appropriations out of same to acquire all bituminous coal properties from the present owners and nationalize them for the public good. It would be a lopsided system of Government that lacked the power to regulate an industry, but had the power to acquire it outright for the public good.

Having decided that the production, sale and distribution of coal affects interstate commerce, and that it is affected with a public interest, it now becomes necessary to decide whether the questioned Act violates the Fifth Amendment.

The provisions of the Act are pointed out in the part of this opinion where the substance of the pleadings is stated. It primarily is intended to control wages, prices, production and distribution. However, in view of the fact that the interstate commerce clause of the Constitution is applicable, and the coal industry is affected with a public interest, the Congress has the power to make reasonable regulations or laws relating to wages, production and marketing.

The prevention of price cutting in the sale of bituminous coal in interstate commerce below the average miuimum cost of production in the several districts is a matter on which the Congress has the power to legislate. See Nebbia v. New York, supra; Lemke v. Farmers Grain Company, supra; Flanagan v. Federal Coal Com-

pany, 267 U. S. 222; Local 167 v. United States, 291 U. S. 295.

It also has the power to provide for the regulation of wages and hours. Wilson v. New, 243 U. S. 332; Block v. Hirsch, 256 U. S. 157.

The administrative provisions of the Act do not delegate legislative power. In Panama Refining Co. v. Ryan, 293 U. S. 388, the Court said:

> "Applying that principle, authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is, as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature."

Judicial review of all administrative orders and decisions is accorded under Section 6(B) of the Act. There is no denial of judicial process and the exercise of arbitrary power is not lodged in any person charged with the administration of the Act.

The tax provisions of the Act are not an unconstitutional exercise of the taxing power. Taxation has been used for many purposes other than the raising of revenue since the Constitution was adopted. But for the power lodged in Congress to levy taxes, there is a reasonable probability that for a long time only eleven States of the Union would have accepted the Constitution.

The power to levy a tax on imports was applied to two recalcitrant states to compel their acceptance of the Constitution, which they promptly did after this imposition.

There is only one exception and two qualifications to the taxing power of the Congress. It cannot tax exports, and direct taxes must be imposed by the rule of apportionment, and indirect by the rule of uniformity.

It has the power to tax for the purpose of regulation, McCray v. United States, 195 U. S. 27; Alaska Fish Company v. Smith, 255 U. S. 49.

There is a further limitation by the rule of construction on the taxing power of Congress, which is fully recognized. It cannot be used for the purpose of promoting, retarding or destroying a business within the ex-

clusive province of the States, and if the tax provided in this Act were solely for the purpose of regulating or controlling the Bituminous Coal Industry, and it was purely intra-state business, it would be an unconstitutional use of the taxing power by the Congress; but as it is a business affecting interstate commerce, the Congress has the power to levy the taxes solely for the purpose of regulating and controlling the industry. To the extent of one and one-half per cent on the sale price per ton the tax is uniform as to all of those within the class, and the classification fair and equitable. Thirteen and one-half per cent of the sale price per ton is a penalty, although called a tax. Hammer v. Dagenhart, 247 U. S. 251; Bailey v. Drexel Furniture Co., 259 U. S. 20.

It is the duty of the Courts to hold fast to the separation of powers under our system of Government. The delicate duty of the Judicial Department to hold an Act enacted by the Congress void because in conflict with the Constitution should never be exercised unless the Judge feels a clear and strong conviction of their incompatability beyond a reasonable doubt. No Judge should ever by his conduct in passing on the constitutionality of an Act subject the Judiciary to the criticism that it was exercising legislative power or the power of the executive to veto.

In considering the future of the States of the Union, we must keep in mind the powers of Government they can efficiently exercise. Modern technology has broken down barriers of space and time. Nation-wide organizations of every large industry in the United States; nation-wide advertisements of products over the radio, the construction of nation-wide highways, the development of the airplane, a rapid system of transportation and communication, have made the States helpless in controlling and regulating commerce. If we cling to the doctrine of States Rights in the matter of commerce as it existed in the early days of the Republic, a palsied hand holds the power and decay will set in in our Nation before its time. If commerce is to be regulated and controlled for the public welfare in this country, it must be by the National Government, because the States lack the power to make effective their own regulations.

I direct that a judgment be drawn dismissing the petition in Action No. 996, R. C. Tway Coal Company v. Glenn, Collector; and the prayer of the petition be granted in Action No. 997, Clark v. Tway Coal Company; and that an order be drawn in Action No. 808, Baltimore Trust Company v. Norton Coal Company, directing the receivers to comply with the Act.

Opinion

However, in view of the serious contention made in this case by the opponents of the Act as to its constitutionality, I believe the enforcement of the Court's judgmene in Actions No. 996 and No. 997 should be postponed pending an appeal of the decision to the Circuit Court of Appeals and the Supreme Court, on condition that all the plaintiffs in Action No. 996 pay to the Clerk of this Court monthly one and one-half per cent of the sale price per ton for all coal mined and produced by each of them, and in addition thereto one per cent of the sum paid in each month for the payment of Clerk's fees. On failure to pay any one of the installments at due date, this stay will be set aside.

Elwood Hamilton,
Judge.

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FINDING OF FACTS—Entered November 14, 1935.

Pursuant to Equity Rule 70½, the Court makes the following finding of ultimate facts:

1. Each of the plaintiffs named in the original bill is a corporation organized as alleged in the bill, and the plaintiffs, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, are corporations organized as alleged in their respective petitions to be made parties plaintiff. Each of the plaintiffs was, at the date of the filing of the bill herein and prior thereto, and now is, engaged in the business of mining bituminous coal at its respective mine, as alleged in the bill.

2. This cause involves a controversy between each of the plaintiffs and the defendant arising under the Constitution and laws of the United States, and the amount in controversy as to each of the plaintiffs is in excess of $3,000, exclusive of interest and costs, and the plaintiffs have a common interest in the constitutional questions involved and in obtaining the relief sought.

3. With the exception of the plaintiffs, Crummies Creek Coal Company, Clover Fork Coal Company and Harlan Collieries Company, each of the plaintiffs operates under a lease, requiring the payment of a stipulated royalty per ton for each ton of coal mined, with a minimum annual royalty, irrespective of the amount of coal mined. The mining plant of each of the lessee plaintiffs is located upon land owned by the landlord, who has a first lien upon all the improvements placed upon the premises by the lessee and upon all mining equipment used in its operation to secure him in the payment of the stipulated royalty. The lease of each of the lessee plaintiffs is the standard form of lease in general use in Harlan County, Kentucky, in the leasing of coal lands for the production of coal, and prohibits the mortgaging of the lease or the improvements thereon without the written consent of the landlord. Said leases further reserve to the landlord the right, at his option, to forfeit the lease for non-payment of stipulated royalty, or upon the institution of receivership, foreclosure or bankruptcy proceedings.

4. The entire capital and surplus of each of the plaintiffs is invested in its plant, equipment and necessary working capital.

5. All sales of coal made by each of the plaintiffs are f. o. b. railroad cars at the mine, with the exception of an inconsequential amount which is shipped to pre-

pay stations, and all sales are made on from thirty to sixty days' time.

6. The plaintiffs, respectively, sell approximately the following percentages of their total production to customers in Kentucky: R. C. Tway Coal Company, twenty-five per cent; Green-Silvers Coal Corporation, four per cent; Black Star Coal Company, four per cent; Pioneer Coal Company, four per cent; Crummies Creek Coal Company, two per cent; Creech Coal Company, four per cent; P. V. & K. Coal Company, two per cent; Cornett-Lewis oal Company, fifteen per cent; Harlan Fuel Company, two per cent; Harlan Central Coal Company, four per cent; Clover Fork Coal Company, two per cent; Harlan Collieries Company, two per cent; Harlan-Wallins Coal Company, five per cent; Three Point Coal Company, eight and six-tenths per cent; Mary Helen Coal Corporation, fourteen per cent; Gatliff Coal Company, one per cent; High Splint Coal Company, one per cent. The remainder of their total production is sold to customers living in other States. Approximately fourteen per cent of all the bituminous coal produced in the United States is sold in the State in which it is mined, and approximately eighty-six per cent in States other than the State in which it is mined.

7. The average net profits of each of the plaintiffs each month do not exceed two per cent of the gross sale price f. o. b. railroad cars at the mine of the coal sold by it each month, with the exception of Harlan Collieries Company and R. C. Tway Coal Company, whose net profits each month, respectively, do not exceed five per cent of the gross sale price f. o. b. railroad cars at the mine of the coal sold by each of them each month; and Harlan Fuel Company and Clover Fork Coal Company, whose net profits each month do not exceed four per cent of such gross sale price of the coal sold by each of them each month. Bituminous coal producers in the Southern Appalachian Bituminous Coal District, which includes Harlan and Bell Counties, do not make as much on an average as five per cent net profit upon the gross sales of coal sold by them each month.

8. All of the men employed by each of the plaintiffs with the exception of a small office force, not exceeding in the case of any plaintiff six men, are engaged exclusively in the mining of coal, with no duties whatever to perform with reference to the sale of coal. The duties of the office force of each plaintiff consist in part in keeping the books and records of the Company with reference to the production of coal, and in part in keep-

ing the books and records in connection with sales of coal.

9. The working capital necessary for each of the plaintiffs to have on hand each month to pay operating costs is as follows: Cornett-Lewis Coal Company, $60,000; Creech Coal Company, $70,000; Harlan Collieries Company, $45,000; Black Star oal Company, $70,000; Pioneer Coal Company, $35,000; Green-Silvers oal Corporation, $25,000; R. C. Tway Coal Company, $60,000; P. V. K. Coal Company, $18,000; Harlan Fuel Company, $60,000; Harlan Central Coal Company, $25,000; Clover Fork Coal Company, $25,000; Harlan-Wallins Coal Corporation, $200,000; Three Point Coal Company, from $25,000 to $40,000; Mary Helen Coal Corporation, from $50,000 to $60,000; Gatliff Coal Company, $25,000. The record does not show the amount of working capital the other plaintiffs are required to have on hand each month, but the Court finds from the entire record they are required to have a sufficient sum on hand to pay the operating costs necessarily incurred in a month's operation.

10. If any of the plaintiffs should undertake to operate and pay the fifteen per cent. penalty imposed by Sections 3 and 9 of the Act for failure to accept the Code provided for in the Act, they could only do so at a heavy loss each month, which could only be paid out of capital assets, all of which are invested in the plant, equipment and necessary working capital of the respective plaintiffs, and the Court finds that it is doubtful if any of the plaintiffs on their own credit, in the face of such losses each month, could borrow the money with which to pay the penalty imposed by Sections 3 and 9.

11. If the plaintiffs should close down their respective mines, in order to avoid payment of the tax, such closing would result in a heavy monthly loss to each of them, which would necessarily be incurred in the upkeep of the mine, the payment of overhead and fixed charges, and to close down for any length of time would result in the loss and disorganization of the working force of each of the plaintiffs and in the loss of their customers, and would probably subject them to liability for damage suits on account of breach of outstanding contracts for the sale and delivery of coal.

12. The average gross sale price f. o. b. railroad cars at the mine of the coal sold by each of the plaintiffs each month is as follows: Cornett-Lewis Coal Company, $55,000; Green-Silvers Coal Corporation, $15,000; Kentucky King Coal Company, $7,000; R. C. Tway Coal Company, $44,000; Harlan Fuel Company, $54,000; Kentucky Car-

dinal Coal Corporation, $20,000; P. V. & K. Coal Company, $10,000; Harlan Central Coal Company, $18,000; Clover Fork Coal Company, $14,000; Crummies Creek Coal Company, $70,000; Black Star Coal Company, $65,000; Pioneer Coal Company, $25,000; Harlan Collieries Company, $38,000; Creech Coal Company, $65,000; Harlan-Wallins Coal Corporation, from $175,000 to $200,000; Three Point Coal Company, $29,000; Mary Helen Coal Corporation, $50,000; Gatliff Coal Company, $22,000; High Splint Coal Company, $50,000.

13. Each of the plaintiffs now has outstanding bona fide written contracts for the sale of coal made after October 2, 1933, and prior to May 27, 1935, for the sale of coal at prices below what must be the minimum prices required to be fixed under the Code, provided the factors required by the Act to be taken into consideration in fixing such minimum price are taken into consideration, and provided there is no reduction in the present scale of wages, and the prices fixed in said contracts are also below the minimum price current as published under the Code of Fair Competition for the Bituminous Coal Industry, pursuant to the National Industrial Recovery Act at the time of the making of such contracts. Each of the plaintiffs also has outstanding bona fide written contracts made after May 27, 1935, and prior to the approval of the Bituminous Coal Conservation Act on August 30, 1935, for the sale of coal at prices below the minimum price for current sale of coal as published under said Code of Fair Competition as at May 27, 1935, and below the minimum prices required in the Act to be fixed, provided such minimum prices are fixed in accordance with the formula therein contained and there is no reduction in the wage scale. The prices fixed in these contracts are below the cost of production, but same were for the sale of nut and slack or slack. Other sizes of coal sold and being sold by the plaintiffs are sold at a profit, so that on their total production the plaintiffs are realizing the percentages of net profit on the gross sale price of their coal as stated in Paragraph 7 of these findings. Exhibit "A," filed with the stipulation in this case, is typical of the contracts above referred to, entered into by the Harlan-Wallins Coal Corporation, Green-Silvers Coal Corporation and P. V. K. Coal Company, and Exhibit "B," filed with such stipulation, is typical of such contracts entered into by the other plaintiffs.

14. The defendant is the regularly appointed, qualified and acting Collector of Internal Revenue for the

District of Kentucky, and he intends to treat the Bituminous Coal Conservation Act, including Sections 3 and 9 thereof, as constitutional, and, in the manner provided by law, to enforce collection from the plaintiffs and each of them of the taxes or penalties imposed by said sections if they should continue their mining operations without accepting the provisions of the Code provided for by said Bituminous Coal Conservation Act of 1935.

To each of the foregoing findings of fact the defendant excepts.

Elwood Hamilton,
U. S. District Judge.

DECREE—Entered November 14, 1935.

This cause coming on for final hearing, and having been submitted on the pleadings and on the evidence, and the Court being fully advised, and for the reasons stated in the opinion filed herein—

It Is Ordered, Adjudged and Decreed:

1. That under the allegations of the bill as amended and the evidence, Section 3224 of Revised States (Section 1543, Title 26 U. S. C. A., 1935 Compilation) is inapplicable, and this Court has jurisdiction of this cause.

2. The jurisdictional amount as to each of the plaintiffs exists, and this cause involves a controversy between the plaintiffs and the defendant arising under the Constitution and laws of the United States.

3. The action is not one against the United States and is not premature, and the plaintiffs have a common interest in the constitutional questions involved and in obtaining the relief herein sought.

4. The Bituminous Coal Conservation Act is a constitutional exercise of the power of Congress to regulate interstate commerce, and is not violative of the Fifth or Tenth Amendments to the Constitution of the United

States, nor does it improperly delegate legislative power.

5. Sections 3 and 9 of the Act, to the extent that they levy a monthly exaction equal to thirteen and one-half per cent of the sale price at the mine of the coal sold by them upon those producers who do not accept the Code provided for in the Act and exempt therefrom those producers who accept said Code, are not revenue provisions, but are a valid exercise of the power of Congress to impose penalties for the purpose of coercing compliance with the regulations of the Act dealing with interstate commerce; and said Sections 3 and 9 do not deprive the plaintiffs of their property without due process of law, in violation of the Fifth Amendment, nor do they violate the rights reserved to the respective States and to the people under the Tenth Amendment to the Constitution of the United States.

6. The plaintiffs are not entitled to the relief sought in their bill as amended, and the action is dismissed at the cost of the plaintiffs.

The plaintiffs having announced in open court that they desire and intend to appeal from this decree to the United States Circuit Court of Appeals for the Sixth Circuit, and having asked that they be granted a stay against the enforcement of said penalties imposed by Sections 3 and 9 of the Act during the pendency of said appeal,—

It Is Therefore Ordered that pending final determination of such appeal the defendant be and he is enjoined from collecting or attempting to collect from the plaintiffs, or any of them, fifteen per cent of the gross sale price at the mine of the coal sold by each of them during that time; but this stay is granted upon the express provision that on or before the tenth day of December, 1935, and on or before the tenth day of each succeeding month thereafter during the pendency of said appeal, the plaintiffs shall pay to the Clerk of this court a sum equal to one and one-half per cent of the gross sale price at the mine of the coal sold by each of them during the previous month, beginning with the month of November, 1935, said sums to be held by the Clerk of this court pending the final outcome of this litigation and subject to the further orders of this Court. In addition thereto, at the time they make each such payment they shall pay to the Clerk a sum equal to one per cent thereof, to cover the Clerk's fees for receiving and paying out money, as provided by law.

The plaintiffs except to so much of the decree as holds that the Act is a valid exercise of the power of

Congress to regulate interstate commerce, and is not violative of the Fifth and Tenth Amendments to the Constitution of the United States; as holds that the Act does not improperly delegate legislative power; as holds the Act a valid exercise of the power of Congress to impose penalties, as provided in Sections 3 and 9 of the Act, for the purpose of coercing compliance with the regulations of the Act under the commerce clause of the Constitution; as holds that Sections 3 and 9 of the Act do not deprive the plaintiffs of their property without due process of law, in violation of the Fifth Amendment; and they also except to so much of the decree as denies the relief sought and dismisses the bill as amneded at the cost of the plaintiffs.

The defendant excepts to so much of the decree as holds Section 3224 of Revised Statutes inapplicable; as holds that the action is not premature; as holds the action is not one against the United States; as holds the jurisdictional amount is involved, and as stays the collection of the fifteen per cent tax imposed by Sections 3 and 9 of the Act pending final determination of the appeal.

Elwood Hamilton,
U. S. District Judge.

STIPULATION.

It Is Stipulated by and between the parties to this action that the attached statements of D. B. Gornett, C. V. Bennett, T. B. Whitfield, B. W. Whitfield, W. J. Silvers, B. F. Reed, W. J. Cunningham, George Creech, R. C. Tway, W. H. Barthold, Roy Carson, O. K. Robinson and E. Guthrie shall be received and considered by the Court as evidence in behalf of the plaintiffs on the trial of this cause, to the same extent and in the same manner as if the witnesses were present in person and testifying under oath to the matters therein stated, subject to the right of the defendant to object and except to

such statements for want of relevancy and materiality.

It Is Further Stipulated that the testimony of Raymond H. Cornett, B. F. Gross, S. J. Dickinson, J. B. Gatliff and Thomas E. Mahan, heard in this cause in open court on November 1, 1935, and which has been transcribed into seventy-five pages of typewritten matter, with the certificate of Clarence E. Walker attached thereto, shall be treated as evidence in behalf of the plaintiffs on this, the final hearing, of this cause, subject to the rulings of the Court, as shown by said transcript.

It Is Further Stipulated that the attached statements of Frederick C. Tryon, Charles O'Neill, H. L. Findlay, George W. Reed, Fred S. McConnell, Philip Murray, F. E. Berquist, and Homer L. Morris, together with the charts and tables referred to and identified in said statements attached hereto, shall be received and treated by the Court as the testimony of said named parties, to the same extent and in the same manner as if they were present in person and testifying under oath to the matters embraced in their respective statements, the plaintiff reserving the right to except to said statements for want of relevancy or materiality.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

Oldham Clarke,
John S. L. Yost,
Attorneys for Defendants.

NOTE—The above mentioned statements and testimony are incorporated in the statement of evidence. The above mentioned charts and tables are transmitted to the U. S. Circuit Court of Appeals without being copied, pursuant to the court's order of November 22, 1935.

STIPULATION.

It Is Stipulated by the plaintiffs, by and through their counsel, Woodward, Dawson & Hobson, and the defendant, by and through his counsel, Oldham Clarke, Assistant United States Attorney for the Western Dis-

trict of Kentucky, and John S. L. Yost, Special Assistant to the Attorney General, that the contract filed herewith as Exhibit "A" between Hickman Williams & Company and Southern Extract Company, and accepted by Harlan-Wallins Coal Corporation, dated June 24, 1935, is typical of the contracts made by the plaintiffs, Harlan-Wallins Coal Corporation, Green-Silvers Coal Corporation and P. V. & K. Coal Company, after October 2, 1933, and prior to August 30, 1935, referred to in the evidence in this case; and it is further stipulated that the contract filed herewith as Exhibit "B" between the Kearns Coal Company of Cincinnati and Ogelbay, Norton & Company, as Agent for the American Radiator Company, approved and accepted by the Harlan Collieries Company, dated April 29, 1935, is typical of the contracts referred to in the evidence and made by all of the plaintiffs other than Harlan-Wallins Coal Corporation, P. V. & K. Coal Company and Green-Silvers Coal Corporation, after October 2, 1933, and prior to August 30, 1935.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.
Oldham Clarke,
John S. L. Yost,
Attorneys for Defendant.

NOTE—The above mentioned contracts are transmitted to the U. S. Circuit Court of Appeals without being copied, pursuant to the court's order of November 22, 1935.

STATEMENT OF EVIDENCE—Filed Nov. 23, 1935.

Be It Remembered: That on the trial of this case there appeared for the plaintiffs as counsel Chas. I. Dawson and A. Shelby Winstead, and for the defendant Bunk Gardner, United States Attorney for the Western District of Kentucky, Oldham Clarke, Assistant United States Attorney for the Western District of Kentucky, and Carl McFarland and John S. L. Yost, Special Assistants to the Attorney General; and thereupon the plaintiffs introduced the following evidence:

RAYMOND H. CORNETT.

Direct examination by Chas. I. Dawson.

My name is Raymond H. Cornett. I am assistant Treasurer of the Harlan-Wallins Coal Corporation, a corporation organized under the laws of the State of Delaware, which is engaged in the mining of coal in Harlan County, Kentucky, and has been so engaged since Septemper, 1924. At this point counsel for the defendant conceded that each of the plaintiffs is a corporation, organized as alleged in the pleadings. The company operates under a leasehold, which provides for a royalty of ten cents per ton, with a haulage charge of one or two cents a ton, making a total of eleven or twelve cents per ton, with a minimum royalty of $39,300 per year. The company's capital and surplus is invested in the plant and equipment, which includes as capital investment the development work inside the mine. The company sells the coal produced by it on the open market, and the average monthly sales f. o. b. railroad cars at the mine amount to from $175,000 to $200,000. The coal is sold on thirty and sixty days' time, and in some instances on ninety days' time, and the working capital necessary to have on hand each month in order to operate the mine is around $200,000. The company has no available resources out of which to pay the fifteen per cent tax imposed by the Act, except its capital and surplus invested in its mining property and working capital. The company could not operate and pay the tax imposed by the Act each month for more than one or two months. The plant would become involved and the losses would run the mine down and the company would have to sell out. The monthly tax which it would be required to pay if it did not operate under the Code would be over $22,000. The company could not pay this tax and continue to operate.

Mr. Yost: The courts have held that ability to pay a tax is not a proper criterion, and this is not proper testimony and I object to it. That is not an element that is recognized by the courts in determining whether or not a hardship exists under Section 3224.

Judge Dawson: I don't understand that the courts have held any such thing. The courts have held that hardship can be taken into consideration, and I am proposing to show that if they have to pay this tax, they will have to stop operating.

Raymond H. Cornett

The Court: I will let this go in now and consider it in my judgment.

For the year ending June 30, 1935, the company made a profit of 1.66 per cent on the gross sale price of the coal sold by it. The company could not pay the fifteen per cent out of profits.

Mr. Yost: I don't want to interrupt constantly. Does my objection continue to hold good?

The Court: You don't have to make that objection any more, but if you want to object to any new matter you will have to do so.

The equipment of the company is located on the leasehold, and the landlord has a lien on all the equipment to protect him in his royalty. The lease under which the company operates is the standard form, providing for forefeiture in case of bankruptcy or foreclosure proceedings, and the company has no power to lease its property without the consent of the landlord. Doubt if the company could operate in defiance of the Code and raise the money to pay the tax, and doubt if any bank would lend the company the money, because the operating statement would show a steady loss each month. Could possibly operate two months without curtailing working capital. When the first payment of tax became due, company would have to stop operation. Company has a million dollar mortgage bond issue against its property. Any money borrowed on the property would have to come after the landlord's lien. All the coal produced is sold f. o. b. railroad cars at the mine except an occasional shipment to a prepay station, and about five per cent of the total production is sold to customers in Kentucky and the remainder to customers out of Kentucky. Company employs about nine hundred men in the actual mining of coal, whose duties are concerned solely with the production of coal. The monthly pay roll amounts to about $110,000, and the wages of the laborers are paid twice a month in accordance with the State law. Company has some written contracts made after October 2, 1933, and before the enactment of the National Bituminous Coal Conservation Act, in which the price at which the coal was sold is less than the minimum price provided in the Act, if the factors of cost set up in the Act are applied in fixing the minimum price. Company has possibly a hundred such contracts, and they cover about half of the total tonnage. Company has written contracts made after Oc-

tober 2, 1933, and prior to the enactment of the law on August 30, 1935, in which the price of the coal sold is less than the minimum price current as published under the Code of Fair Competition for the Bituminous Coal Industry pursuant to the National Industrial Recovery Act at the time the contracts were made.

Mr. Yost: That is objected to.

The Court: The contract will be the best evidence. If you insist on it, the objection will be sustained.

Judge Dawson: Have you the contract?

A. No, sir.
Q. Do you know what you are selling your coal at?
A. Yes, sir.
Q. You have direct charge of the sale?
A. Yes, sir.
Q. Did you make those contracts?
A. Yes, sir. We have a sales agency.
Q. And you have personal knowledge of those contracts?
A. Yes, sir.

Judge Dawson: If he knows it, I think he ought to be allowed to state it.

The Court: What is the ground of your objection?

Mr. Yost: I think the contract should be offered in evidence.

Judge Dawson: It would take two or three days to get those contracts.

The Court: Are they all in the same form?

The Witness: Yes, sir.

The Court: You could put one of those in.

Judge Dawson: But they were different prices.

A. Yes, for the different grades.
Q. But you have contracts at prices less than those fixed in the Code of Fair Competition for the Bituminous Coal Industry?
A. Yes, sir.

The Court: Make up one and submit it as a sample and let that be marked "Plaintiffs' Exhibit No. 1."

The company has written contracts entered into after October 2, 1933, and prior to the enactment of this law

in 1935, in which the prices are less than the minimum prices current as published under the Code of Fair Competition pursuant to the National Industrial Recovery Act at the time of making such contracts.

The Court: Let a sample of that be filed as "Plaintiffs' Exhibit No. 2."

If the company should close down its mine rather than comply with the Code, it would still have to pay a minimum royalty amounting to about $3,000 per month; would have to keep the water out of the mine, keep the entries all cleaned out, have to meet the interest charges on the company's indebtedness, would have to take care of the property on the outside, and it would probably be depreciating in value all the time. The organization of the men for the purpose of producing coal is of value, and these men would leave, which would result in a loss of house rentals. The net profit of 1.66 per cent on the gross sales of coal mined by the company does not take into consideration the fifteen per cent tax imposed by the Act, nor any part of it, but does take into consideration all other taxes, including the landlord's taxes on the property leased, which the company is required to pay.

Cross-examined by Mr. Yost.

The company has no working agreement with its men as to wage price now obtaining. With a monthly pay roll of $110,000, the tax imposed by the Act, amounting to about $22,000 per month, from a mathematical standpoint could be taken care of by cutting employees' wages approximately twenty-two per cent.

Judge Dawson: I object to that.

The Court: I will let it go in. Both sides put in all you want, although I think very little of this is competent.

Some of the men get $5.26 for seven hours' work. Machine men get ten cents a ton and loaders get sixty cents a ton. The wages depend upon what a man does. Mathematically speaking, a reduction of twenty-two per cent in the wage scale would take care of the fifteen per cent tax, but that does not necessarily mean that the company could cut the wages. The men might not work. The company pays the standard wage scale that was formulated in Washington.

Raymond H. Cornett

The Court: Would it be possible for you do get men to work if you had a different and less wage scale?

A. We don't think so.

When I said a moment ago that our written contracts for sales of coal violated the minimum prices to be paid under the Act, I did not compute what the minimum price would be under the Act. I assume that the minimum price will be considerably higher because of the raise in the wage scale. My reason is that there has been a flat cost of $1.65 and there has been a wage increase since. We have contracts at less than $1.65. $1.65 is not the price fixed in the Act, but it is bound to be more under your weighted average. What I have in mind is not the provisions referred to in the Act with reference to minimum prices, but that we have contracts at a less price than the cost now. We have contracts below cost on slack coal and below the cost figured according to the Act. I have no idea what the price under the Act will be.

Mr. McFarland: How do you compute these various items—labor, supplies, power, taxes insurance, workmen's compensation, royalties, depreciation, etc.—how do you know but what they are way below the average?

A. They may be.

Q.—If they are below the averages, how can you reach your conclusion?

A. I don't think I understand your question.

Q. I don't mean to embarrass you, but here are several points that have to be considered in arriving at the total cost. You say this Act will fix the prices which will be such that they will be higher than the prices of your contracts—is that right?

A. Yes, sir.

Judge Dawson: Have you any written contracts executed for the sale of coal after October 2, 1933, and before the effective date of this law, August 30, 1935, at a price less than the minimum price provided in this Code, if the formula in that Act is followed in fixing the total cost?

A. If I understand the formula to be the actual cost of production, we have.

Raymond H. Cornett

Mr. McFarland: You answered the question that if it is to be the actual cost: What about your average cost?

A. I have no way of knowing our average cost.

Mr. McFarland: Then I move to strike out his testimony on that point.

The Court: Let me see if I can help. How do you determine what the cost of your product is to be under this section of the Act that Judge Dawson has called your attention to?

A. The cost of these items laid down in the last sentence of the fourth paragraph under Part II,—I am assuming that the price will not be less than the total of those items.

The Court: How do you know what those items are in your business?

A. I know what they have been heretofore. Now we have just had an increase and I don't know what will be the cost under that increase.

The Court: And you mean the price at which you are now selling your coal is less than the cost of production?

A. We have contracts out at less than the cost of production.

The Court: And you are selling the coal under those contracts at less than it cost you to produce?

A. Yes, sir.

The Court: And you mean that under the law you will have to raise your selling price up to the cost of production—is that right?

Judge Dawson: I think I can straighten that out. In addition to the cost you are now incurring in the production of your coal under the formula for fixing minimum prices, there has been another item included, namely, the taxes imposed by this Act?

A. Yes, sir.

Q. And you know that your costs will be higher than they now are?

A. Yes, sir.

Q. And your minimum price will be higher than your costs unless you reduce your wages?

A. Yes, sir.

The Court: All you take into consideration is the fifteen per cent?

A. Yes, sir.

The Court: You increased cost by reason of the fifteen per cent?

A. Yes, sir.

Mr. McFarland: That will be subject to the Act.

Judge Dawson: Yes, but he would have to raise one and one-half per cent in any event.

The Court: The inquiry is whether by the payment of the fifteen per cent his business will be destroyed in a little while.

Judge Dawson. This amended pleading filed today says that even those contracts made after October 2, 1933, and before the effective date of this law, August 30, 1935, is less than this minimum price and is less than the price under the provisions set out in Section 12 of the Act. We are showing here not only that his price is now less, but that if he makes his price according to the formula, then his contracts will be still more under the cost of production.

The Court: He did not make it very clear to me, but the best I can tell is that the Code provides that no coal shall be sold at less than the cost of production.

Judge Dawson: It provides for a minimum price which shall not be less than the minimum price of production arrived at under Part II of section 4.

The Court: He says that when he adds the fifteen per cent to his cost, it will be a higher cost than the price which he receives for the coal now under contract.

Judge Dawson: He also says that the price under these contracts is less than the price in Section 12, and he would have to shut down, and that if he doesn't operate his mine will run down.

Mr. McFarland: I want to know what the price will be under the Code.

Raymond H. Cornett

A. I don't know what the price will be.

I don't know what it will be when they correlate the prices between the different price areas. They have not tried to collect any taxes from my company yet. No one has sent our company any blanks on which to put down the figures for the tax. No one has asked us to do anything under the Act so far. I know what the Code prices were that were in effect after October 2, 1933, and prior to May 27, 1935, and I knew what they were in relation to the prices fixed in our written contracts, and the prices fixed in those contracts were below the Code prices and they were below the Code prices that were current as at May 27, 1935; and assuming that the Government takes into consideration in fixing the minimum prices all the elements of cost set up in Section 4 and there is no reduction in wages, the prices in these contracts would be below the minimum prices fixed in the Act. I have seen the publication sent out by the Code authorities that they expect to enforce the Code against all those who do not comply with its provisions. I got a request to sign an acceptance of the Code, but I did not sign it. I have seen in the last few days a statement by some officer of the Bituminous Coal Commission that he proposes to cancel the contract with every person or concern that has a contract with the Government if they don't buy from producers who work under the Code. I don't know why our company does not join the Code. I am Assistant-Treasurer—not a director. I do not attend directors' meetings and know nothing whatever of the directors' actions, except I was instructed that we would not join the Code. I don't know why they refused to sign the Code. I seriously doubt, if we should cut wages enough to make up either the thirteen and one-half per cent on the selling price of the coal or fifteen per cent on the selling price of the coal each month, we would have any men remaining at work. If we kept in business we would have to reduce the price of labor and if we could not reduce it we would just have to quit unless the reduction affected the whole field. The plaintiffs constitute the greater part of the Harlan field —If the Act should he held valid, and because of our failure to accept the Code we were required to pay the taxes from November 1, 1935, to January 1, 1936, they would close down our company.

B. F. GROSS,

I am Secretary and Treasurer of Three Point Coal Company, which is a corporation organized under the laws of the State of Kentucky and operating a coal mine in Harlan County, Kentucky. The company operates under a leasehold under the standard lease prevalent in that section of the country. Our royalty is seventeen and three-fourths cents per ton, with a minimum royalty whether we operate or not. The lease has the usual forfeiture provisions. The improvements which we have placed on the property, including houses and things of that sort, are a part of the leasehold. Our capital and surplus is invested in the plant, equipment and working capital. The plant and equipment, includes entries, shafts and working places in the mines, and the equipment consists of means for hauling the coal, digging the coal, and the tipple and miners' houses and things of that sort. We sell our coal on thirty and sixty days' time f. o. b. railroad cars at the mines. The minimum annual royalty is $10,000. The landlord has a first lien on all of our equipment, and the company can not mortgage the property without his consent. The company has no mortgage indebtedness and no assets except its capital and surplus, invested in its plant, equipment and working capital. The working capital necessary for a month's operation is from $25,000 to $40,000. Our miners are paid twice a month, as required by State law. 8.6 per cent of our coal in 1934 was sold to customers within the State of Kentucky, the balance to customers in other States. Our monthly sales amount to around $29,000. In 1929 we had a net profit of 5.5 per cent on gross sales. In 1930 we lost 2.9 per cent. In 1931 we lost 6.06 per cent. In 1932 we lost 19.1 per cent. In 1933 we lost 4.2 per cent. In 1934 we had a gain of 3.7 per cent, and in the first nine months of 1935 we showed a loss of .86 per cent, all these figures being upon the gross sale price f. o. b. mines of the coal sold. Our company could not disregard the Code and pay the tax and continue to operate. Its resources out of which it could pay the tax would enable it to operate for only a short length of time—probably four or five months. The company would have an average loss of $4360 a month on account of the tax, which would be just that much drain upon the capital which would be dissipated. After the first three or four months we would have to use the working capital with which to pay the tax, and after that we could not raise the money. The company could not stand such a strain. At the time the law was passed and approved, on August 30, 1935, the company

had written contracts made after October 2, 1933, in which the price of the coal was less than the minimum price current as published under the Code of Fair Competition for the Bituminous Coal Industry pursuant to the National Industrial Recovery Act. Something between twenty-five and thirty per cent of the nut and slack coal produced by the company was under such contracts. These were contracts made after October 2, 1933, and prior to May 27, 1935, with the exception of one or two which may have been made afterwards. If wages are not reduced and all the items of cost named in the Act are considered by the Commission in fixing the minimum prices required to be fixed under the Code, and adding thereto a one and one-half per cent tax on those accepting the Code, the prices fixed in these contracts are less than the minimum prices thus arrived at. All coal is contracted for before it is produced unless it is impounded on a coal track. All our contracts for the sale of coal are made before it is mined. The company employs around three hundred men, engaged exclusively in the production of coal and who have nothing to do with the selling end of the business.

Cross-examined by Mr. McFarland.

Prices have not been fixed for our coal, so far as I know, and the taxes imposed by the Act have not been actually assessed. We have received only one form from the Commission. There has been no demand made on the company. We did not accept the Code because we think we are competent to run our own business.

Q. How could you be hurt if you joined the Code?

Judge Dawson: That is objected to.

The Court: That is for the court to decide. He can state the facts.

Witness continuing: We would not be able to pay the fifteen per cent taxes. We had a gain in 1934 because business was better in 1934 than before. The NRA Code was in effect during that year and our company was a member of that Code. I did not say that the minimum price under the Code would be such that our company would have to break its contracts. I don't know whether the prices named in our contracts would be lower than the minimum prices fixed or not.

S. J. DICKENSON.

Secretary and Treasurer of the Mary Helen Coal Corporation, which is a corporation organized under the laws of the State of Virginia, operating a bituminous coal mine in Harlan County, Kentucky, on property which it holds under lease. The company pays a royalty of thirteen cents per ton, with a minimum annual royalty of $10,000. The landlord has a first lien on all the property of the lessee to secure him in the payment of royalty. The company does not have the power to mortgage its property without the consent of the landlord. The average monthly sales f. o. b. railroad cars at the mine amount to about $50,000. The coal is sold f. o. b. railroad cars on thirty and sixty days' time. All the capital and surplus of the company is invested in equipment, buildings and working capital. This includes improvements, working shafts that have been driven into the bowels on the earth for the purpose of extracting coal, etc. These working places in the mine are of no value after the coal has been taken out. The company is required to have on hand each month a working capital of from $50,000 to $60,000. It has no resources other than what it has invested in development, equipment and working capital and bills receivable for coal sold. About fourteen per cent of the coal is sold to customers in Kentucky and the remainder to customers outside of the State. Approximately three hundred and fifty men are employed in the mine, all of whom are engaged exclusively in the mining of coal. The monthly pay roll runs from $35,000 to $45,000. The company has some written contracts entered after October 2, 1933, and before May 27, 1935, in which the price at which the coal is sold is less than the minimum price current under the NRA Code at the time the contracts were made. These contracts were for delivery after the expiration of the National Industrial Recovery Act. The company also has some written contracts made after May 27, 1935, and before August 30, 1935, in which the price for the coal sold is less than the minimum price fixed by the old NRA for current sales as of May 27, 1935, and assuming that the minimum prices required to be fixed under the Code are so fixed as to take into consideration all the factors laid down in the law, and that there are no wage reductions, these contracts are at a less price than the minimum prices thus arrived at. The average net profit realized by the company on the gross sale price of the coal sold by it during recent years is about four and one-half per cent of such gross sale price f. o. b. railroad cars at the mine.

S. J. Dickenson

I don't think the company could pay the tax imposed on those who do not accept the Code and continue to operate. I don't know where the company could borrow the money to pay the taxes if it should operate without accepting the Code.

Cross-examined by Mr. McFarland.

The minimum prices provided for in the Act have not been fixed. I have not taken the formula for fixing minimum prices set up in the Act and computed what the prices under it must be. I have taken the old NRA prices as the basis and our contracts are under those prices; and assuming that the minimum prices fixed under the Act are equal to these NRA prices, then our contract prices referred to are below what these minimum prices will be. That is the sole basis of my statement. I don't know what the prices will be under the new set up.

Redirect Examination.

I know what the coal was costing us when we made these contracts and I know that we sold at below the cost. In figuring the cost I figured the cost of labor, the supplies necessary to be used in the mining of the coal, the power we would have to use, the taxes which we were subject to pay, the insurance, workmen's compensation, royalties, depreciation as allowed by the Internal Revenue Department, and all other items of cost that I know of, including coal operators' association dues, the reasonable cost of selling and the cost of administration, and we sold the coal at a price below the total of these costs, and these costs have not decreased. I did not take into consideration the one and one-half per cent of the sale price which has been added as an item of cost under the Act. The coal we sell under cost is steam coal. The block coal is sold at a profit and absorbs the loss on the steam coal, in most cases. I don't know of any of our customers who would be willing to release us from these contracts.

Further Cross-examination.

In computing cost of the coal covered by the contracts referred to, I was considering only the cost at our mine.

J. B. GATLIFF.

I am President of the Gatliff Coal Company, a corporation organized under the laws of the State of Kentucky, and engaged in the mining of bituminous coal from its mines located in Whitley County, Kentucky. The company operates under a leasehold, with an annual minimum royalty of $6,000. The lease is the standard mining lease in use in that section of the country, and contains the usual forfeiture provisions, with a lien retained in favor of the landlord to secure him in the payment of his royalty. The company can not mortgage its property without the consent of the landlord, and the landlord may institute forfeiture proceedings if the property is mortgaged without the consent of the landlord or goes into bankruptcy. In 1934 the gross sales of coal produced by the company amounted to $206,431, and in 1935, up to this date, to $188,108.00. The gross sales amount to between $22,000 and $23,000 a month. I do not think that the average net earnings of bituminous coal producers in the coal field in which the company's mine is located would amount to as much as five per cent of the gross sales at the mine. The capital and surplus of the company is invested in its plant and equipment, with a working capital around $25,000 per month. The coal is all sold f. o. b. cars at the mine on thirty and sixty days' time. The company has no available resources except its capital investment in the plant, development work and working capital, except that the company owns a one-half interest in fee in the leasehold. The company could not operate and pay the tax of fifteen per cent and would not attempt to do so. About one per cent of the coal produced by the company is sold to customers living in the State of Kentucky, and the remainder to customers living in other States. The company has some written contracts for the sale of coal made after October 2, 1933, and prior to May 27, 1935, at prices below the minimum prices current as published under the Code of Fair Competition for the Bituminous Coal Industry pursuant to the National Industrial Recovery Act at the time the contracts were made, but I would not say that these contracts cover a substantial part of the production. I would say that the company also has some contracts made after May 27, 1935, and before the effective date of the Act on August 30, 1935, at prices below the minimum price current as published under the Code of Fair Competition for the Bituminous Coal Industry under the National Industrial Recovery Act. I would also say that these contracts are for the sale of coal at prices below the total costs figured as

required by the Act in determining minimum prices to be fixed under the Act. The company had no resources enabling it to go out and borrow money to pay the fifteen per cent tax on an operating statement showing that it is sustaining a loss each month, and I don't think the company would attempt to do so.

Cross-examined.

In answering the questions asked me with reference to written contracts calling for the sale of coal at less than cost, my answer was based on the cost of my own company and not on the basis of cost of the average company in the district.

THOMAS E. MAHAN.

I am the attorney for the Gatliff Coal Company and the High Splint Coal Company, and handle their income tax matters. While I do not keep the books of these companies, I audit for both of them. I started with each of these companies on January 1, 1919. Since 1932 there has been a loss sustained by the Gatliff Coal Company each year. The first nine months of 1935 the company sustained a loss of $16,423. The company has no resources with which to pay the taxes imposed by the Act except its earnings, working capital and plant and a very small surplus of probably $25,000 or $30,000 which it uses as working capital. $25,000 or $30,000 a month is a reasonable working capital for a mine of the size of the Gatliff Coal Company. If the company had to pay this tax of fifteen per cent, it would have no means whatever of raising the money with which to pay it. The company has to meet its pay roll each month before it collects the money for the coal produced that month. The gross sale price at the mine each month of the coal produced by the company runs from $20,000 to $25,000. Labor is paid twice a month.

I am also Vice-President of the High Splint Coal Company and make the income tax returns for that company. It operates on a leasehold and is a rather large operation. The average sales of that company f. o. b. railroad cars at the mine amount to about $50,000 per month. Above one per cent of this sold to customers living in Kentucky and the remainder to customers living outside of the State. The capital and surplus of the company is invested in the development of the plant

and equipment. The development work is of value merely when the mine is a going concern. When the coal is exhausted it is not worth anything. The driving of entries, air-ways and shafts represent a very large part of the investment. It has an incline three thousand feet long in order to get to the coal upon the hill. The company has ordinary standard lease in use in that part of the country, with the usual forfeiture clauses. The royalty is ten cents a ton, with an annual minimum royalty of $25,000. The landlord has a prior lien on everything to secure him in his royalty. The company has no right to mortgage the lease without the written consent of the landlord. The penalty for disregard of this provision is forfeiture of the lease. This company sustained a loss equal to five per cent of the gross sales in 1932; made a profit of about five per cent of the gross sales in 1933; about two per cent profit in 1934; and up until September of 1935 the company has sustained a loss of about four per cent of the gross sales: The company could not refuse to accept the Code and pay the fifteen per cent tax without sustaining a loss practically equivalent to the amount of the tax. The company could operate and pay the tax only as long as it would take to consume the surplus. The company works about three hundred men. If the company undertook to borrow the money with which to pay the tax, the operating statement would show such a loss that it could not borrow on its own credit from any bank. The company would have nothing with which to pay the money back except through the sale of its property. The High Splint Coal Company on August 30, 1935, when this Act became operative, had in effect written contracts made after October 2, 1933, and prior to May 27, 1935, at prices for coal which were less than the minimum current prices under the National Industrial Recovery Act in effect at the time the contracts were made.

The Court: Do you accrue taxes?

A. Yes, sir; we checked them up.

The Court: State and County taxes and anticipated federal income taxes—you do that on the monthly basis?

A. Yes, sir.

The company has written contracts made after May 27, 1935, and prior to August 30, 1935, at prices below the minimum price current as published under the Code

Thomas E. Mahan

of Fair Competition for the Bituminous Coal Industry by the NRA.

The Court: You don't accrue any taxes on this until the last day of the month?

A. We set it aside at the beginning.

The Court: You wouldn't set it up as a reserve until the close of the month?

A. No, sir.

Judge Dawson: Where would you get the money to pay the tax?

A. We would make a book entry.

Cross-examined by Mr. McFarland.

Q. You would not set it aside?

A. We don't set aside the actual cash on any of these items but that is a bookkeeping entry to show how much money we are going to have to pay out and we have to watch the bank account to see that we have the money.

Q. If you have not the money now if you are making a loss on your operations, where would you get it?

A. We have not run at a loss on our entire operations but we have on this one.

Q. You would make a bookkeeping entry of it?

A. Yes, sir; even if it were $1,000,000.

Q. Suppose you should charge this up to accrued taxes would you still put that on your books?

A. Not unless we paid it out.

Q. On the final conclusion of this case you don't know whether the Supreme Court will say you have to pay this tax or not?

A. If we have to we will give the property in part payment.

Thereupon the parties, by their counsel, filed their written stipulation that the statements of D. B. Cornett, C. V. Bennett, T. B. Whitfield, B. W. Whitfield, W. J. Silvers, B. F. Reed, W. J. Cunningham, George Creech, R. C. Tway, W. H. Barthold, A. K. Robinson, E. Guthrie and Roy Carson, attached to said stipulation, might be offered and read as evidence on behalf of the plaintiffs with the same effect as if the witness were present in court and testifying under oath, the defendant reserving the right to object to said testimony only on the

ground of want of relevancy and materiality; and that the statements of Frederick C. Tryon, Charles O'Neill, H. L. Findlay, George W. Reed, Fred S. McConnell, Philip Murray, F. E. Berquist and Homer L. Morris, attached to said stipulation, together with the charts and tables referred to and identified in said statements, might be offered and read as evidence on behalf of the defendant with the same effect as if the said witnesses were present in court and testifying under oath, the plaintiffs reserving the right to object to said testimony only for want of relevancy and materiality.

Said statements offered and read by the plaintiffs as evidence in their behalf, in accordance with the terms of said stipulation, are as follows:

D. B. CORNETT.

He is President of Cornett-Lewis Coal Company, which is a Kentucky corporation with bituminous coal mines in Harlan County, Kentucky, operating upon a leasehold at a royalty for one mine of ten cents a ton and one of twelve and one-half cents, with a total minimum of between twenty-five and thirty thousand dollars per year. Entire capital and surplus are invested in plant, equipment and necessary working capital.

Average gross sales f. o. b. railroad cars at mine per month amount to approximately $55,000. Sales are made on 30 and 60 days' time. Working capital absolutely necessary to have on hand each month is approximately $60,000. Profits per month in the operation of the plant do not exceed on an average two per cent of gross sales. If required to pay the fifteen per cent tax for failure to accept the Code, it would be impossible to do so except out of capital assets, invested as above stated, which would necessarily mean the exhaustion of working capital within a very short time. To operate without accepting the Code would result in disastrous losses each month, and the Company could not and would not undertake to operate in the face of the certainty of sustaining such losses, as operation would very soon lead to exhaustion of the Company's resources and bankruptcy, even if the Company could raise the money with which to pay the taxes. The Company on its own credit, in the face of such losses each month, could not borrow the money with which to pay the tax.

The lease under which the Company operates reserves to the landlord a first lien on all the property of

the Company on the leasehold, to secure the landlord in the payment of his royalty, and requires the Company to pay the landlord's taxes on the fee. The leasehold and the lessee's property thereon can not be mortgaged without the written consent of the landlord, and it is provided in the lease that same may be forfeited at the option of the landlord for non-payment of royalty, for permitting foreclosure proceedings, or upon the institution of receivership proceedings or bankruptcy proceedings.

At the time the Bituminous Coal Conservation Act of 1935 became effective the Company had outstanding bona fide written contracts for the sale of coal made after October 2, 1933, and before May 27, 1935, at prices below the minimum prices current as published under the Code of Fair Competition for the Bituminous Coal Industry pursuant to the National Industrial Recovery Act at the time of making such contracts, and also bona fide written contracts for the sale of coal made after May 27, 1935, and prior to the date of the approval of said Act at prices less than the minimum prices for current sale of coal, as published under the Code of Fair Competition as at May 27, 1935. The prices fixed in these contracts are also below what must necessarily be the minimum prices required to be fixed under Section 4 of the Act, provided such minimum prices are fixed in accordance with the formula set up in the Act, but of course witness does not know what these prices will be. All these contracts are for nut and slack coal. Other coal produced by the mine is sold at prices to return a profit, but the total net profit of operation each month, taking into consideration both the coal sold at a profit and that sold at a loss, does not exceed on an average two per cent of the gross sale price f. o. b. railroad cars at the mine. The contracts referred to are being filled according to their terms, and there is no reason to believe that if the Company should accept the Code the holders of these contracts would release the Company from obligation thereunder.

Operators in the Southern Appalachian Bituminous Coal District, which includes Harlan County, do not make as much as five per cent net profit upon the gross sales of coal each month. All of the coal sold by Cornett-Lewis Coal Company is sold f. o. b. railroad cars at the mine, except a very small percentage consigned to prepay stations. Approximately fifteen per cent of the coal sold by the Company is to customers in Kentucky, including coal sold and delivered to railroads in Ken-

tucky for fuel purposes; the remainder of the production is sold to customers in other States.

There are no such daily quotations on the sale price of coal as obtain with reference to grain, cotton, cattle, hogs, etc. There is no Coal Exchange whose quotations control the daily price of coal. Each producer fixes his own price from day to day on each transaction involving a sale of coal.

The Company employs on an average about four hundred men, all of whom are engaged exclusively in the mining of coal and have no duties whatever to perform with reference to the sale of coal. The Company employs only about six men who have anything whatever to do with the selling end of the business, these men being the office force, whose duties in part consist in keeping the books and records with reference to production, and in part handling the books and records in connection with sales.

If the Company should close down in order to avoid payment of the tax, it would be at a heavy monthly expense. This expense would be around twenty cents per ton on the capacity production of the mine, which would amount to approximately $5,000 per month. Furthermore, if the Company should close down for any considerable length of time it would lose its working organization of miners, its customers, and would subject itself to liability for damage suits on account of breach of contracts for the sale and delivery of coal.

C. V. BENNETT.

He is the President of Harlan-Central Coal Company, which is a Kentucky Corporation, operating a bituminous coal mine in Harlan County, Kentucky. The Company does not own the fee to the land under operation, but operates under a leasehold. The entire capital and surplus of the Company are invested in its plant, equipment and necessary working capital.

The average gross sales, f. o. b. railroad cars at the mine, per month, amount to approximately $18,000,00. Sales are made on thirty and sixty days time, working capital absolutely necessary to have on hand each month is approximately $25,000.00; net profits per month on the operation of the plant do not exceed 2% of the gross sales price of coal sold. All of the coal sold by the Harlan-Central Coal Company is sold f. o. b. railroad cars at the mine approximately 4% thereof being sold

to customers in Kentucky and the remainder to customers in other states. The Company employs on an average about one hundred fifty men, all of whom are engaged exclusively in the mining of coal with no duties whatever to perform with reference to the sale of coal. The Company employs less than a half dozen men who have anything to do with the sale of coal, these men being the office force, whose duties in part consist in keeping the books and records with reference to production, and in part the books and records in connection with sales.

If the Company should close down in order to avoid payment of the tax it would be at a heavy monthly expense, amounting to about 20c per ton on the capacity production of the mine, which would amount to approximately $2,000.00 per month. If the mine should be closed down for any considerable length of time the Company would lose its working force, as well as its customers, and would subject itself to liability on suits for damages for failure to fulfill its contracts. The statement of D. B. Cornett, in all respects except as herein modified, correctly states the situation of the Harlan-Central Coal Company, and is adopted as a part of this statement.

If the Company is required to pay the fifteen per cent tax for failure to accept the Code, it would be impossible for it to do so except out of capital assets, invested as above stated, which would necessarily mean the exhaustion of working capital within a month or so. Each month's operation would be at a disastrous loss, and the Company could not and would not undertake to operate in the face of the certainty of sustaining such losses. The Company on its own credit, in the face of such losses each month, could not borrow the money with which to pay the taxes, even if it desired to operate.

T. B. WHITFIELD.

He is General Manager of the Clover Fork Coal Company, which is a Kentucky corporation operating a bituminous coal mine in Harlan County, Kentucky. The Company owns the fee to the land from which it is extracting coal, and its entire capital and surplus are invested in its plant, equipment and necessary working capital.

The average gross sale f. o. b. railroad cars at the mine per month amount to approximately $14,000. Sales

are made on thirty and sixty days' time, and the working capital absolutely necessary to have on hand each month to pay the cost of operation is approximately $25,000. The net profits per month of the Company do not exceed four per cent of the gross sale price of the coal sold. All the coal sold is sold f. o. b. railroad cars at the mine, all of it being sold to customers outside of Kentucky with the exception of about two per cent thereof.

The Company employs on an average about 125 men, all of whom are engaged exclusively in the mining of coal, with no duties whatever to perform with reference to the sale of coal. The Company employs less than a half dozen men who have anything to do with the sale of coal, these men being the office force, whose duties in part consist in keeping the books and records with reference to production, and in part in keeping the books and records in connection with sales.

If the Company is required to pay the fifteen per cent tax, it would sustain such a disastrous monthly loss that its investment would soon be destroyed. It could not and would not undertake to operate with the certainty of such a loss facing it. If it should attempt to operate, it would have no money with which to pay the tax and continue to meet its other monthly expenses, and it could not on its own credit, in the face of such losses each month, borrow the money with which to pay the taxes and would not attempt to do so, as there would be no way of repaying the money except through the sale of capital assets.

If the Company should close down in order to avoid payment of the tax, it would still be at a heavy monthly expense of around twenty cents per ton on the capacity production of the mine. In the aggregate this would amount to around $2,000 per month. Furthermore, to close down for any considerable length of time would result in the loss or disorganization of the working force, loss of the Company's customers, and would subject the Company to the danger of suits for breach of contracts for the sale and delivery of coal.

All the statements contained in the evidence of D. B. Cornett, except as here modified and except as to the lease provisions therein referred to, are true as to Clover Fork Coal Company, and are adopted as part of this statement.

B. W. WHITFIELD.

He is Vice-President of Harlan Collieries Company, which is a Kentucky corporation, engaged in the mining of bituminous coal from its mine in Harlan County, Kentucky. The company owns its land in fee, and its entire capital and surplus are invested in its plant, equipment and necessary working capital.

The average gross sales f. o. b. railroad cars at the mine per month amount to approximately $38,000.00. Sales are made on thirty and sixty days time, and the working capital absolutely necessary to have on hand each month to pay the costs of operation is approximately $45,000.00. The net profits per month of the company do not exceed 5% of the gross sale price of the coal sold. All the coal sold by the company is sold f. o. b. railroad cars at the mine, approximately 2% thereof being sold to customers in Kentucky and the remainder to customers in other States.

The company employs on an average about 300 men, all of whom are engaged exclusively in the mining of coal, with no duties whatever to perform with reference to the sale of coal. The company employs less than half a dozen men who have anything to do with the sale of coal, these men being the office force, whose duties in part consist in keeping the books and records with reference to production and in part in keeping the books and records in connection with sales.

If the company is required to pay the 15% tax, it would sustain such a disastrous monthly loss that its investment would soon be destroyed. It could not and would not undertake to operate with the certainty of such a loss facing it. If it should attempt to operate, it would have no money with which to pay the tax and continue to meet its other monthly expenses, and it could not on its own credit, in the face of such losses each month, borrow the money with which to pay the tax.

If the company should close down in order to avoid payment of the tax, it would still be at a heavy monthly expense amounting to around 20c per ton on the capacity production of the mine. In the aggregate, this would amount to around $4,000.00 per month. Furthermore, to close down for any considerable length of time would result in the loss or disorganization of the working force, the loss of the company's customers, and would subject the company to the danger of suits for breach of contracts for the sale and delivery of coal.

All the statements contained in the evidence of D. B. Cornett, except as herein modified and except as to the

lease provisions therein referred to, are true as to the Harlan Collieries Company and are adopted as a part of this statement.

W. J. SILVERS.

He is President and General Manager of Green Silvers Coal Corporation, which is a Kentucky corporation, operating a bituminous coal mine in Harlan County, Kentucky. The company does not own the land from which it is extracting coal, but operates upon a leasehold. Its entire capital and surplus are invested in its plant, equipment and necessary working capital.

The average gross sales f. o. b. railroad cars at the mine per month amount to approximately $15,000.00. Sales are made on thirty and sixty days time, and the working capital absolutely necessary to have on hand each month to pay the costs of production and other necessary expenses is approximately $25,000.00. Profits per month in the operation of the plant do not exceed on an average of 2% of gross sales, and if the company is required to pay the 15% tax, it would sustain such a disastrous monthly loss that its investment would soon be destroyed. It could not and would not undertake to operate with the certainty of such a loss. If it should attempt to do so it would have no money with which to pay the tax and on its own credit, in the face of such losses each month could not borrow the money with which to pay the tax.

All of the coal sold by the Green Silvers Coal Corporation is sold f. o. b. railroad cars at the mine, and approximately 4% thereof is sold to customers in Kentucky. The remainder of the production is sold to customers in other States.

The company employs about 125 men, all of whom are engaged exclusively in the mining of coal and have no duties whatever to perform with reference to the sale of coal. The company employs only three or four men who have anything whatever to do with the selling end of the business, these men being the office force whose duties in part are keeping the books and records with reference to the production and in part in keeping the books and records in connection with sales.

If the company should close down in order to avoid payment of the tax, it would still be at a heavy monthly expense amounting to around 20c per ton on the capacity production of the mine. In the aggregate this would amount to approximately $2,000.00 per month. Further-

more, to close down for any considerable length of time would result in the loss or disorganization of the working force, the loss of the company's customers, and subject the company to the danger of suits for breach of contracts for the sale and delivery of coal.

All of the statements contained in the evidence of D. B. Cornett, except as herein modified, are true as to the Green Silvers Coal Corporation and are adopted as a part of this statement.

B. F. REED.

He is Vice-President of the Black Star and Pioneer Coal Companies, which are Delaware corporations, the Black Star operating a bituminous coal mine in Harlan County, Kentucky, and the Pioneer Coal Company operating a coal mine in Bell County, Kentucky. They each operate under a leasehold, and the entire capital and surplus of each company are invested in the plant, equipment and necessary working capital.

The average gross sales f. o. b. railroad cars at the mine per month amount to approximately $65,000 for the Black Star Coal Company and $25,000 for the Pioneer Coal Company. The net profits per month realized on the operation of each of the plants do not exceed two per cent of the gross sales of the coal sold by each of them. All the coal sold by each of them is f. o. b. railroad cars at the mine, approximately four per cent thereof being sold to customers in Kentucky and the remainder to customers in other States.

The Black Star Coal Company employs on an average about 400 men, and the Pioneer about 150 men, all of whom are engaged exclusively in the mining of coal, with no duties whatever to perform with reference to the sale of coal. Each of the Companies employs less than a half dozen men who have anything to do with the sale of coal, these men being the office force, whose duties in part consist in keeping the books and records with reference to production, and in part in keeping the books and records in connection with sales.

The sales are made on thirty and sixty days' time, and the working capital absolutely necessary to have on hand each month is approximately $70,000 for the Black Star Coal Company and $35,000 for the Pioneer Coal Company. If the Companies are required to pay the fifteen per cent tax for failure to accept the Code, it would be impossible to do so except out of capital assets,

invested as above stated, which would necessarily mean the exhaustion of working capital within a very short time. Each month's operation of each of these Companies would thus result in a disastrous loss, and the Company would not and could not undertake to operate in the face of the certainty of sustaining such monthly losses, as operation under such conditions would soon lead to bankruptcy. Neither of the Companies on its own credit, in the face of such losses each month, could borrow the money with which to pay the taxes, even if it desired to operate. Should the Companies close down in order to avoid payment of the tax, it would be at a heavy monthly expense to each of them. This expense would be approximately twenty cents per ton on the capacity production of each of the mines, and would amount to about $8,000 per month for the Black Star Coal Company and about $3,000 per month for the Pioneer Coal Company. In addition to these losses, if these Companies should close down, they would each lose its working organization of miners, its customers, and would subject itself to liability for damage suits on account of the breach of contracts for the sale and delivery of coal.

All the statements contained in the statement of D. B. Cornett, except as here modified, apply to each of the Companies herein dealt with, and are adopted as a part of this statement.

W. J. CUNNINGHAM.

He is President of Crummies' Creek Coal Company, a Kentucky corporation engaged in operating a bituminous coal mine in Harlan County, Kentucky. The Company owns the fee to the land under operation. The entire capital and surplus of the Company are invested in plant, equipment and necessary working capital.

Average gross sales f. o. b. railroad cars at the mine per month amount to approximately $70,000. Profits per month in the operation of the plant do not exceed on an average five per cent of gross sales. If required to pay the fifteen per cent tax for failure to accept the Code, it would be impossible to do so except out of capital assets, invested as stated above, which would necessarily mean the exhaustion of working capital within a very short time. Each month's operation would be at a disastrous loss, and the Company could not and would not undertake to operate in the face of the cer-

tainty of sustaining such lo ·es, as operation under such conditions would soon lead to bankruptcy. The Company on its own credit, in the face of such losses each month, could not borrow the money with which to pay the taxes, even if it desired to operate. All the coal sold by the Company is f. o. b. railroad cars at the mine. Approximately two per cent of production is sold to customers in Kentucky, and the remainder to customers in other States.

The Company employs on an average around four hundred men, all of whom are engaged exclusively in the mining of coal and have no duties whatever to perform with reference to the sale of coal. The Company employs only about six men who have anything whatever to do with the selling end of the business, these men being the office force, whose duties in part consist in keeping the books and records with reference to the production end of the business, and in part in keeping the books and records in connection with the sales end of the business.

Should the Company close down in order to avoid payment of the tax, it would be at a heavy monthly expense. This expense would be approximately twenty cents per ton on the capacity production of the mine, and would amount each month to between seven and eight thousand dollars. In addition to this loss, if the Company should close down, it would lose its working organization of miners, its customers, and would subject itself to liability for damage suits on account of breach of contracts for the sale and delivery of coal.

All the statements contained in the statement of D. B. Cornett, except as here modified and except as to the statements in the Cornett statement with reference to leaseholds, apply to the Crummies Creek Coal Company, and are adopted as a part of this statement.

GEORGE CREECH.

He is Assistant General Manager of the Creech Coal Company, which is an Arizona corporation with bituminous coal mines in Harlan County, Kentucky, operating upon a leasehold at a royalty of ten cents per ton, with a minimum royalty of ten thousand dollars per year. The entire capital and surplus of the Company are invested in plant, equipment and necessary working capital.

Average gross sales f. o. b. railroad cars at the mines per month amount to approximately $65,000. Sales are

made on 30 and 60 days' time. Working capital absolutely necessary to have on hand each month is approximately $70,000. Profits per month do not exceed an average of two per cent of the gross sales. If required to pay the fifteen per cent tax for failure to accept the Code, it would be impossible to do so except out of capital assets, invested as above stated, which would necessarily mean the exhaustion of working capital within a very short time, and in disastrous losses each month, and the Company could not and would not undertake to operate in the face of the certainty of sustaining such losses, as operation under such conditions would soon lead to the bankruptcy of the Company. The Company on its own credit, in the face of such losses each month, could not borrow the money with which to pay the tax.

Operators in the Southern Appalachian Bituminous Coal District, which includes Harlan County, do not make as much as five per cent net profit upon the gross sales of coal each month. All of the coal sold by the Creech Coal Company is sold f. o. b. railroad cars at the mines, except a very small percentage consigned to prepay stations. Approximately, four per cent of the coal sold by the Company is to customers in Kentucky, and the remainder of the production is sold to customers in other States.

The Company employs on an average about four hundred men, all of whom are engaged exclusively in the mining of coal, and have no duties whatever to perform with reference to the sale of coal. The Company employs only about six men who have anything whatever to do with the selling end of the business, these men being the office force, whose duties in part consist in keeping the books and records with reference to the production of coal, and in part the books and records in connection with sales.

If the Company should close down in order to avoid payment of the tax, it would be at a heavy monthly expense. This expense would be around twenty cents per ton on the capacity production of the mine, and would amount to approximately $70,000 per month. In addition to this loss, to shut down for any considerable length of time would result in the loss of its mine, in the loss of its market and customers, and subject the Company to the danger of damage suits for breach of contracts to supply coal.

The statement of D. B. Cornett with reference to the provisions of the lease under which his Company

operates, and with reference to written contracts made after October 2, 1933, and prior to the date of the approval of the Bituminous Coal Conservation Act, at prices less than the NRA Code prices prevailing at the time such contracts were made, and at prices less than the minimum price provided for in the Act, if such minimum price is made according to the formula provided in the Act; and the statement of said Cornett, to the effect that coal is not sold according to any daily quotation, but that each producer fixes his own price from day to day on each sale made, are all applicable to the Creech Coal Company, and are adopted as fully as if copied herein.

R. C. TWAY.

He is President of R. C. Tway Coal Company, a Kentucky corporation engaged in the mining of bituminous coal from its mine in Harlan County, Kentucky. Its entire capital and surplus are invested in its plant, equipment, and necessary working capital.

Average gross sales f. o. b. railroad cars at the mine per month amount to approximately $44,000. Sales are made on thirty and sixty days' time, and the working capital absolutely necessary to have on hand each month to pay the cost of operation is approximately $60,000. The net profits per month of the Company do not exceed five per cent of the gross sale price of the coal sold. All the coal sold by the Company is sold f. o. b. railroad cars at the mine, and approximately twenty-five per cent thereof is sold to customers in Kentucky and the remainder to customers in other States.

The Company employs on an average about three hundred men, all of whom are engaged exclusively in the mining of coal, with no duties whatever to perform in connection with the sale of coal. The Company employs only about six men who have anything to do with the sale of coal, these being the office force, whose duties in part consist in keeping the books and records with reference to production and in part in keeping the books and records in connection with sales.

If the Company is required to pay the fifteen per cent tax, it would sustain such a disastrous loss monthly that its investment would soon be destroyed. It could not and would not undertake to operate with the certainty of such a loss facing it. If it should attempt to do so it would have no available funds with which to

pay the tax for any considerable period of time and continue to meet its other monthly expenses, and it could not on its own credit, in the face of such losses each month, borrow the money with which to pay the tax and it would not attempt to do so, as the money thus borrowed could be repaid only through the sale of the assets.

If the Company should close down, in order to avoid payment of the tax, it would still be at a heavy monthly expense in upkeep, and in the protection of the mine, amounting to around $6,000 per month. Furthermore, to close down for any considerable length of time would result in the loss and disorganization of the working force, the loss of the Company's customers, and would subject the Company to the danger of suits for breach of contracts for the sale and delivery of coal.

All the statements contained in the evidence of D. B. Cornett, except as herein modified, are true as to R. C. Tway Coal Company, and are adopted as a part of this statement.

W. H. BARTHOLD.

He is President of Kentucky King Coal Company, which is a Kentucky corporation operating a bituminous coal mine in Harlan County, Kentucky, under a lease, and its entire capital and surplus are invested in its plant, equipment and necessary working capital.

The fair market value f. o. f. railoard cars at the mine per month of the coal produced by that Company is $7,000, the Company and its affiliated companies using most of the coal thus produced. The Company could not operate and pay the fifteen per cent tax, as to do so would result in a disastrous monthly loss and its investment would soon be destroyed. It could not and would not undertake to operate with the certainty of such a loss facing it. It would have no money with which to pay the tax and continue to meet its other monthly expenses, and it could not on its own credit, in the face of such losses each month, borrow the money with which to pay the tax.

If the Company should close down in order to avoid payment of the tax, it would still be at a heavy monthly expense, amounting to about twenty cents per ton on the capacity production of the mine. In the aggregate this would amount to around $2,000 per month. Furthermore, to close down for any considerable length of

time would result in disorganization of the working force, which is a valuable asset of any mine.

A. K. ROBINSON.

He is President of P V & K Coal Company, which is a Delaware corporation operating a bituminous coal mine in Harlan County, Kentucky, under a leasehold. All of its capital and surplus are invested in its plant, equipment and necessary working capital.

The average gross sales f. o. b. railroad cars at the mine per month amount to approximately $10,000. Sales are made on thirty and sixty days' time, and the working capital absolutely necessary to have on hand each month to pay the cost of operation is approximately $18,000. The net profits per month of the Company do not exceed two per cent of the gross sale price of the coal sold. All the coal sold by the Company is sold f. o. b. railroad cars at the mine, approximately two per cent thereof being sold to customers in Kentucky and the remainder to customers in other States.

All the Company's employees, with the exception of three or four office men, are engaged exclusively in the mining of coal, with no duties whatever to perform with reference to the sale of coal. The duties of the office men in part consist in keeping the books and records with reference to production, and in part in keeping the books and records in connection with sales.

If the Company is required to pay the fifteen per cent tax it would sustain such a disastrous monthly loss that its investment would soon be destroyed. It could not and would not undertake to operate with the certainty of such a loss facing it. If it should attempt to operate it would have no money with which to pay the taxes and continue to meet its other monthly expenses, and it could not on its own credit, in the face of such loss each month, borrow the money with which to pay the tax and it would not attempt to do so, because it would be faced with a certainty of its inability to repay the loan except by a sale of its property.

If the Company should close down, in order to avoid payment of the taxes, it would still be at a heavy monthly expense, amounting to around $2,000 per month. Furthermore, to close down for any considerable length of time would result in the loss or disorganization of the working force, the loss of the Company's customers, and would subject the Company to the dan-

ger of suits for breach of contracts for the sale and delivery of coal.

All the statements contained in the evidence of D. B. Cornett, except as herein modified, are true as to the P V & K Coal Company, and are adopted as a part of this statement.

E. GUTHRIE.

He is President of Harlan Fuel Company, a Kentucky corporation operating a bituminous coal mine in Harlan County, Kentucky, under a leasehold. Its entire capital and surplus are invested in its plant, equipment and necessary working capital.

The average gross sales f. o. b. railroad cars at the mine per month amount to approximately $54,000. Sales are made on thirty and sixty days' time, and the working capital absolutely necessary to have on hand each month to pay the cost of operation is approximately $60,000. The net profits per month of the Company do not exceed four per cent of the gross sale price of the coal sold. All coal sold is sold f. o. b. railroad cars at the mine, all of it being sold to customers outside of Kentucky with the exception of about two per cent thereof.

The Company employs about three hundred and fifty men, who are engaged exclusively in the mining of coal, with no duties whatever to perform with reference to the sale of coal. The Company employs less than a half dozen men who have anything to do with the sale of coal, these men being the office force, whose duties in part consist in keeping the books and records with reference to the production of coal and in part in keeping the books and records in connection with the sale of coal.

If the Company is required to pay the fifteen per cent tax, it would sustain such a disastrous monthly loss that its investment would soon be destroyed. It could not and would not undertake to operate with the certainty of such a loss facing it. Even if it should attempt so to do, its working capital would be so exhausted in two or three months by the payment of the tax that it would have no money with which to pay its operating expenses, and it could not on its own credit, in the face of such losses each month, borrow the money with which to pay the taxes and it would not attempt to do so, as there would be no way of repaying the money except through the sales of capital assets.

E. Guthrie Roy Carson

If the Company should close down, in order to avoid payment of the tax, it would still be at a heavy monthly expense in the upkeep of its mine and in the payment of necessary recurring expenses, of approximately $5,000 per month. Furthermore, to close down for any considerable length of time would result in the loss and disorganization of its working force, loss of the Company's customers, and would subject the Company to the danger of suits for breach of contracts for the sale and delivery of coal.

All the statements contained in the evidence of D. B. Cornett filed herein, except as here modified, are true as to the Harlan Fuel Company, and are adopted as a part of this statement.

ROY CARSON.

He is Traffic Manager of Appalachian Coals, Incorporated, which is a selling agency for about seventy-five per cent of the high volatile bituminous coal produced in southern West Virginia, Eastern Kentucky, Eastern Tennessee and Southwestern Virginia. He has been connected with the bituminous coal industry since 1919, and has made a study of the various problems implicit in that industry, including the production and distribution of coal.

According to the figures of the United States Geological Survey, the total coal reserves of the United States, including all kinds and grades, is approximately 3,535 billion tons. Of this amount 1,200 billion tons may be classed as sub-bituminous coal, which, on the whole, is inferior to bituminous coal; 1440 billion tons is bituminous coal, as that term is generally understood. In 1929 there were produced in the United States approximately 530 million tons of bituminous coal. The production of bituminous coal since 1929 has been much below this figure, but taking the production of bituminous coal for the year 1929 as an average, it would take over 2800 years to exhaust the available supply of bituminous coal in the United States.

Thereupon the defendant, expressly waiving any objection to the statements of the foregoing thirteen witnesses on account of the fact that the witnesses did not appear and testify under oath in open court, filed his written objection to each of said statements other than that of Roy Carson as irrelevant and immaterial,

and particularly to the statements of said witnesses "in so far as they attempt to show: (a) the conditions under which the respective plaintiffs will be required to operate under the said Act, either as members or non-members of the Code; (b) that the respective plaintiffs will not be able to operate under said Act and pay the required tax; (c) that the respective plaintiffs will be required to defend damage suits for breach of contract as the result of the operation of said Act; and in so far as said statements attempt to show any hardship upon the respective plaintiffs by reason of the provisions of the Act, and in so far as said statements express the opinions and conclusions of the respective witnesses, for the reason that said avowals in said statements are immaterial and irrelevant and can have no effect upon the constitutional questions here involved;" and also move the Court to strike the statements of said witnesses with respect to the matters enumerated in said objection. The court overruled the objection to the statement of said witnesses and the motion to strike same. The Court on its own motion strikes the statement of Roy Carson as irrelevant and immaterial, the statement being allowed to remain in the record as the avowal of the plaintiffs as to the evidence of the witness, Roy Carson. The defendant excepted to the ruling of the Court overruling his objection to the statement of said witnesses other than Roy Carson, and in overruling his motion to strike same; and the plaintiffs excepted the ruling of the Court in striking the statement of Roy Carson.

Thereupon the defendant tendered and offered to read the statements of Frederick C. Tryon, Charles O'Neill, H. L. Findlay, George W. Reed, Fred S. McConnell, Philip Murray, F. E. Berquist and Homer L. Morris, attached to and referred to in said stipulation, and also offered as evidence the charts and tables referred to and identified in said statements; and the plaintiffs, expressly waiving any objection on account of the fact that said witnesses did not appear and testify under oath in open court, filed their written objection and exception to the entire statement of each of the witnesses above named, because said statements in their entirety are irrelevant and immaterial, expressly objecting and excepting to said statements "in so far as they attempt to detail the economic situation in the Bituminous Coal Industry, and in so far as they attempt to deal with the relation of the production of coal to interstate commerce, and in so far as they attempt to deal with the necessity of the regulation by Congress of the bituminous coal industry, and in so far as they express the

opinions and conclusions of the respective witnesses, for the reason that said statements are immaterial and irrelevant and can have no effect upon the constitutional questions here involved''; and move the court to strike the statement of each of said witnesses as evidence. The Court sustained said objection to said statements in their entirety and the motion to strike same, but permitted same to remain in the record as the avowal of the defendant as to the evidence of each of said witnesses.

Said statements are as follows:

The testimony of FREDERICK C. TRYON with the exhibits referred to therein and admitted in evidence under the stipulation is as follows:

I am employed by the United States Government in the Economics Branch of the United States Bureau of Mines, assigned to duty in the Coal Division of that Branch, my title being Principal Economist. I have been a student of the coal industry since 1917. My training is that of a Mineral Economist, with supplementary studies of economic geology. My training was acquired at the University of Minnesota and at Johns Hopkins University.

I studied geology merely to get a background for the pursuit of inquiries in mineral economics, and to gain some knowledge of reserve conditions. I followed geology long enough to earn a very poor living as an oil company geologist, and to pass the assistant geologist examination of the United States Geological Survey, and be appointed. I was immediately assigned to work in the economic and statistical inquiry branches, and have been so engaged ever since. I have done no work of a technical character for the United States Government, either as a geologist or as an engineer, although I have been in contact with technical men.

In the narrow field of economic and statistical approach I have had unusual opportunity to study the fuel industry of the United States, and of the world; rather I should say the coal industry of the United States and of the world.

I was assigned as junior assistant to the Committee on Coal Production of the Council of National Defense in 1917. Likewise, I was detailed to assist the statistician of the Geological Survey in charge of coal and coke, he later becoming Director of the Division of Statistics of the United States Fuel Administration.

Frederick C. Tryon

I was drawn into the army, and posted at the War Department, with instructions to watch fuel as a limiting factor in the conduct of the war, and was in frequent contact with the United States Fuel Administration at that time, learning much of its problems without in any sense being responsible for its success. I was sent overseas, to General Headquarters, for a time, and then was detailed to the economic section of the American Peace Commission at Paris, and put to work studying the coal industry of the central powers with reference to the reparations section of the Treaty of Versailles. I was for a time Secretary of the American Section of the Raw Materials Division of the Supreme Economic Council.

Returning to the United States I was appointed in the Statistical Unit of the United States Geological Survey, dealing with coal and coke, and shortly thereafter placed in charge of that unit, and have been associated with that work since, including the period since 1925 when it was transferred to the United States Bureau of Mines.

During that time I have been on leave of absence a number of times. I was sent abroad as a delegate to the World Power Conference at London in 1925, and had occasion to spend some months studying the coal industry of England, on the ground. I have also had opportunities to study the coal industry in Nova Scotia, Australia, and to go underground in all these countries. I was on leave of absence at the Brookings Institution, on one or two tours of duty, and took part in the preparation of their study on America's capacity to produce, writing the mining section of that report.

I was detailed for some months to the President's Committee on Recent Social Trends, and wrote the mining chapters of that report.

I was attached to the President's Committee on Fuel Coal Distribution, set up by President Harding, during the 1922 strike of miners, and took some part in the efforts to control distribution of coal at that time. I was statistical adviser to the United States Coal Commission of 1922-23, and edited its report.

I have had occasion to write a large number of reports on the statistical economic trend of the coal industry for the United States Bureau of Mines and the Geological Survey.

I wrote and edited the volume called "What The Coal Commission Found," and another volume on "Mineral Economics" published by the Brookings In-

stitution. And I believe I have lectured on mineral economics at the University of Pennsylvania graduate school and the Robert Brookings graduate school.

My approach has been throughout from the standpoint of a statistician and on economics. I think I may fairly say that I have tried to make it an impartial approach. I do not own any coal company securities, and have declined any offers of employment by coal companies or coal associations.

I did not happen to be connected with the National Recovery Administration, and I have no connection with the present National Bituminous Coal Commission.

The Bureau of Mines, of course, has primary responsibilities in the field of accident prevention, promotion of health of miners, and in technological studies, in the attempt to reduce mine accidents and improve mine technology. Those I know nothing about. It likewise has an economics branch, which collects and publishes primary statistics of the supply and demand of mineral commodities.

I work in the Coal Economics Division of that branch. Its function is to try to watch the flow of coal, the production, the consumption, the stocks, distribution, price movements. I do that currently on a scale sufficiently detailed, and at a rate sufficiently rapid to be of some service to buyers and sellers.

The unit also watches long-time trends of the industry insofar as they are recorded in the production, the operation of mines, and the mechanical equipment of mines. Also, the volume of employment and working time.

The entire work of the Bureau, of this branch of it in particular, is based on voluntary cooperation, and we cannot wisely or effectively go into controversial points, such as costs of production, investments, profits, or wage rates.

The data I have been asked to prepare and present on this occasion, that deal with the subjects of costs, investments, or wage rates, are therefore necessarily drawn from other sources, but which I believe to be reliable.

Any opinions or expressions of judgment which I may give herein represent my personal views only and do not represent the position of the Bureau of Mines nor of any other members of the staff. Indeed, I have not discussed the issues raised by this case with other officials of the Bureau, and I do not know what their views may be.

Frederick C. Tryon

I shall refer herein from time to time to certain charts and tables which were prepared either by me or under my supervision. These charts and tables are attached hereto and for convenience I shall designate them as follows:

Chart No. 1 entitled "Bituminous coal production, realization, and mine capacity in the United States, 1899-1934."

Statement No. 1-A attached to the foregoing exhibit and entitled "Bituminous coal production, realization, and mine capacity in the United States, 1899-1934."

Chart No. 2 entitled "Trends of employment, working time, wage rates, and labor productivity, 1899-1934."

Statement No. 2-A attached to the foregoing chart and entitled "Trends of employment, working time, wage rates, and labor productivity, 1899-1934."

Chart No. 3 entitled "Average spot prices of bituminous coal, 1913-1931, by months."

Statement No. 3-A attached to the foregoing chart and entitled "Average spot prices of bituminous coal, 1913-1931, by months."

Chart No. 4 entitled "Net income or deficit of the bituminous coal industry, prior to deductions for tax, for specified years, 1917-1934."

Statement No. 4-A attached to the foregoing chart and entitled "Net income or deficit of the bituminous coal industry prior to deductions for tax; for specified years, 1917-1934, according to Treasury Department date."

The reason that bituminous coal is important in the economic life of the country is, of course, perfectly simple. American economic life has become completely dependent on energy, and bituminous coal is the principal source of energy. National consumption of energy has grown by leaps and bounds so that during the last 25 years we have consumed more fuel and more power than in all the previous history of the country, back to the days of earliest colonization.

There is no need, of course, to enumerate the ways in which heat and power have woven themselves into American economic life. Industrial uses and heat are quite as important as the keeping of buildings warm; and as for power, it has had an immense development.

The dentist uses it in his little drill, and the street laborer uses it in his pneumatic punch.

Nowhere in the world is this dependence on power and heat as great as it is in the United States. According to studies by Professor T. T. Reed of Columbia University, more than 97 per cent of the total output of work in the United States is now derived from mechanical power, and human power makes up less than 3 per cent.

The per capita use of mechanical power is far greater in the United States than in any other country. It is 1.6 times as great as in England, 2½ times as great as in Germany. It is eleven times as great as Japan and 150 times as great as in a country like China. American life is becoming absolutely dependent upon a continuous flow of energy. Without it we would not only freeze but starve. All but a small part of this flow of energy comes from fuel, and the largest part from bituminous coal. Electricity, of course, is merely a convenient way of applying energy. It is not the primary source of energy. The electric generator has to be driven either by fuel or falling water.

Last year, 1934, our computations of the source of the total energy supply of the United States gave the following results: Water power supplied 9.3 per cent of the national energy supply. Natural gas supplied 8.7 per cent; and oil, including that part which is used in driving automobiles and which included imported oil, supplied 28 per cent. Coal of all kinds supplied 54 per cent. Of that 54 percent, 7.7 per cent came from anthracite, and 46.3 per cent came from bituminous coal. Bituminous coal is, therefore, the largest single source of the energy budget of the United States.

The share contributed by coal to the total energy supply has been declining, and the share of oil and natural gas and water power has been increasing, as everyone knows. While some of this increase in supply of oil is a direct displacement of coal, the important bulk of it goes into motor fuel to drive automobiles, where coal is hardly supposed to compete, or in other uses where coal can hardly compete.

If one considers the familiar uses of coal in the generation of steam and heat, he finds that coal still dominates. Our computations indicate that in 1929 bituminous coal supplied 75 per cent of all the primary energy used in manufacturing industries. That does not include purchased electricity produced, of course, in central electric stations. Bituminous coal supplied, in 1934, 76 per cent of all the fuel used by the public utilities, that is

the steam electric plants producing power for public use. Bituminous coal supplied, in 1933, 83.6 per cent of all the the energy used by the railroads for locomotive power.

The potentialities of water power are limited. Mr. Charles P. Steinmetz calculated before his death that if every rain drop falling on the United States should be transformed into power it would not supply the amount of energy already derived from coal.

I would state that in my own opinion water power can never furnish more than a minor fraction of the energy requirements of the United States. The supplies of oil and gas are also clearly limited. It is probable that for the next few years there will be further increases in the use of liquid fuel, but geologists are generally agreed that present supplies cannot be maintained for more than a few decades.

An inventory by the United States Geological Survey estimates the reserves of recoverable oil in known fields of the United States at 13,360,000,000 barrels. If those were drawn on steadily at the 1933 rate of production, it would last not quite 15 years, assuming, that is, that no new fields were discovered, and that it were possible to recover all the oil in that time. Practically, it would be impossible to produce the full amount of these estimated reserves in even 25 years, because, as a field gets older, the amount of oil which can be taken out in the course of a year declines, and it is well recognized that new fields will be discovered, and that improvements in the technology will increase recoveries beyond limits now practical, but the prospects of further discovery do not obscure the facts, as the Geological Survey reports: "Petroleum reserves are irreplaceable, and each year's production brings the nation nearer to an inadequate supply and ultimate exhaustion." Geologists Arnold and Kemnitzer, who are petroleum geologists of outstanding reputation, reviewing the natural resources, make the following estimate as of January 1, 1929, before the East Texas field was discovered but making allowance for future discoveries: "The resources of natural crude oil in the United States are estimated to have been on January 1, 1929, a little more than 50 per cent developed, but less than 30 per cent exhausted. At the rate wells were then being drilled, average full development would be reached in 30 years at the end of which time would begin a long period of post-development production lasting 113 years, to practical exhaustion." (Petroleum in the United States and Possessions, 1931," pp. 51, 52).

It is a reasonable interpretation of Arnold and Kem-

nitzer's position that they attach no exact value to these figures of the number of years that the supply would last. The point that is important to bear in mind is that the supply is limited, that these geologists in particular, and the United States Geological Survey, hold that the total production will necessarily decline after a few decades. As petroleum diminishes in supply, or increases in cost, the burden of meeting the national requirements for energy will naturally be transferred more and more to coal. Methods are already in commercial use in Europe for the conversion of coal into motor fuel, and at much higher prices than prevail in the United States, but there is no question that if and when a shortage of petroleum forces a great advance in the price of crude oil and refined products in the United States, the necessary motor fuel and lubricant can be made from bituminous coal. This will throw, before many decades, a greatly increased burden upon our coal supplies. The increased demand will fall upon bituminous coal. The reserves of Pennsylvania anthracite are already 29 per cent exhausted, and there is no prospect that anthracite production can increase materially over the past maximum attained during the war years. The soft coal mines, therefore, must continue to be our chief source of the flow of energy that is necessary to American industrial life.

Technical efficiency, insofar as it can be measured in terms of statistical performance, is high in the bituminous coal industry of the United States, if not the highest in the world. The resources of bituminous coal are abundant, and they are favorable to low-cost mining. I have made measurements of the average thickness of bed, the average dip of the seam, the depth of coverage, and other physical factors in the mines of the United States as compared with those of foreign countries, particularly of Great Britain. If necessary, this evidence could be presented, but I imagine there would be no dispute among practical coal men that mining condition are exceptionally favorable in this country. The beds are relatively thick. They lie close to the surface in many places. They outcrop on almost every hillside, in portions of the Appalachian field. They are exceptionally free, in comparison with European conditions, from faults or from igneous dikes, such, as occur in parts of Great Britain. They are flat-lying. The roofs, on the whole, are favorable to the application of machinery. On almost all physical factors, the natural conditions in coal deposits in the United States are among the most favorable in the world.

As further proof of the technical efficiency of the United States, from statistical sources we have computed the average output per man per day underground in the American bituminous mines and in those of Europe and of other countries. The output per man per day here is about three times that of Germany, and nearly four times that of England. It is six times that of Belgium or Japan. The data, in terms of metric tons per man per day, are: For the United States bituminous mines, 4.9 tons per man; for Great Britain, 1.3 tons per man per day; for the Ruhr district of Germany, 1.6 tons per man per day; for France, 1 ton per man per day; for Belgium, 1.8.

Furthermore, the efficiency of the American industry has been increasing. The test of efficiency is the growth of the average output per man per day over a period of years. In 1890, according to the records of the Geological Survey, and of the Bureau of Mines, the tonnage per worker was 2.56 tons, and in 1932 this had increased to 5.22 tons. In other words, the output per man per day has more than doubled in the period since 1890, and the advance has been especially rapid in the last few years. The record is shown in the lower curve on Chart No. 2. The chart begins in 1899, and extends to 1934. This is the record of the gradual increase in the output per worker. The apparent decline in 1933 is partly a statistical fraction, and partly due to some shortening of hours and diminishing of overtime, as an effect of the N. R. A. program. These figures are in terms of net tons per man per day, whereas the ones I cited in making comparison with foreign countries were in metric tons per man, underground.

I do not see any physical obstacle in either the natural resources or the present physical and mechanical equipment of the mines, or any lack of managerial or engineering skill which would prevent the industry from providing a reasonable reward to the capital and labor engaged in it. As far as those factors are concerned, I see no reason why this industry cannot be among the most prosperous of American businesses, yielding generous wages to employees and reasonable profits and reasonable rewards to management. The difficulties lie in the economic organization of this industry and of the competing industries producing other fuels.

The present difficulties of the bituminous coal mining industry are not wholly new; as far back as the statistical record can be pushed, there was a marked surplus of the mine capacity. This surplus of capacity came about

from many causes. The resources were widespread. They had passed into the ownership of hundreds of thousands of farmers, and their farms, in turn, had been sold to a large number of land-holding companies. The owners desired to realize on their investments, in the only way they could put it to use, and that tended to open more mines than were needed. The pressure of taxes and carrying charges on these land-holdings led to opening still more mines. Once the mines opened, the pressure of overhead, the tax burden, and other factors drove the operator to produce all that he could possibly sell.

Shifts in market demand occurred, throwing tonnage from one district to another district. The change from beehive to by-product coking caused a transfer of the heavy load of business from some of the northern fields formerly producing a beehive coke to the southern fields, in a position to supply coal for by-product coke in markets where by-product ovens were established. The expansion of the railroad net alone led to the opening of many new fields, and consequently of new mines. The freight-rate and wage-rate structures were, on the whole, so adjusted as to encourage development of the outlying districts. Finally, large-scale suspensions in the organized fields tended to cause consumers of coal, during the period of the suspensions, to seek sources of supply elsewhere, and were a factor in the devolopment of additional capacity. All of these factors combined create the surplus of mine capacity. The statistical record of capacity is shown in chart No. 1.

At the top of the chart is given the full-time capacity at 308 working days a year, and below it is shown also the capacity assuming 280 days, a more conservative figure, which was suggested some years ago by the coal department of the American Institute of Mining and Metallurgical Engineers.

Both these records of capacity are calculated from the reports supplied by mine operators to the Bureau of Mines, or, in earlier years, the Geological Survey. They show what the mines could produce if they worked a specified number of full-time days, 308 days, with the same equipment and the same labor force, and at the same rate of production that they actually obtained on the days that they were operating. In the calculation of the national total capacity, each mine is weighted in accordance with its tonnage and its importance.

Turning to the figure of full-time capacity at 308 days, it is important to bear in mind that coal mines

actually do try to operate 308 days a year, or they did, before the coming of the N. R. A. code. There is possibly some limitation as a result of the code.

The daily car loading records, kept over many years, show that in the typical districts coal would be leaving the mines—some mines, at least—on every one of 308 calendar days in the working year. In some districts the working year is a bit longer, and in other districts a bit shorter than 308 days, on account of variations in observance of holidays, but the national average is very close to 308 days. There are quite a number of mines that succeed in operating 308 days a year. Many of them are captive mines. There are numerous instances where a mine has produced 308 days without a breakdown or without loss of time.

However, it is clear that all mines cannot manage to avoid mechanical breakdowns during the course of the year, and that some allowance has to be made for the possibility of falls of roof, accidents, failure of power supply, or some other mechanical difficulty that will shut down the mines. To test this point, I have made a study of the operating performance of 2,000 mines over a period of five years, and it shows that on the average the typical mine will lose about nine days out of the year through failures of a mechanical character of one kind or another. 308 days less nine days in 299 days. On 299 days of the year the mines were there in this period, physically able to produce, and seeking a market.

Even in the pre-war days, the soft coal mines of the country never approached 299 days a year. The actual average for the years 1890 down to 1914, was 213 days a year, so that out of this physically available 299 days they lost, on an average, 86 days.

Of this 86 days average, an idleness of 34 days has to be set down as more or less unavoidable on account of the seasonal character of demand. Consumers require more coal in winter than they do in summer. In the middle west the January peak may be twice as high as their off-season trough. Obviously, until consumers change their buying habits, the industry has to maintain a capacity sufficient to take care of this peak.

Over the country as a whole our studies indicate that the seasonal pattern of demand involves an average loss of 34 days a year, which cannot well be avoided unless consumers are induced to change their buying habits. But the fact that there are 34 days of seasonal idleness that cannot be avoided does not make the loss of time

any less serious to the worker or to the owner of the mine.

The miner has to feed himself on the 34 days when the consumer is out of the market, and the operator has to continue to pay fixed charges and overhead. The operator is therefore under continuous pressure to try to sell that coal on the days when the market is dull, and the surplus continues to hang over the market. That is why coal prices usually fall off during the summer months.

This one fact, that the bituminous coal industry has to maintain a productive capacity sufficient to take care of the seasonal peak, is one of the great causes of the intense competition in the industry. In the pre-war days the industry never approached even the limitations that would be permitted by the seasonal pattern capacity.

If you take nine days away from the 308 days time, and get 299 days potential working time that is physically available, and then subtract from that 34 days for seasonal loss, there remains 265 days in the year, where, if capacity were nicely and accurately balanced with demand, the mines would be able to work, but they have never succeeded in attaining the 265 days.

During the pre-war days, in addition to the seasonal idleness, there was an average loss of 52 days a year, which has to be set down to simple excess of capacity beyond even the maximum seasonal need. Some of this time might be taken out in a car shortage or a labor dispute, but even if there had been no artificial interruption, like a car shortage or a labor dispute, the mines would have continued to be idle through lack of demand. The capacity was developed, even then, not only beyond average requirements, but beyond peak seasonal requirements.

As the chart shows, capacity continued to grow throughout the pre-war period. It grew, in fact, slightly faster than demand. The total capacity, on the full-time basis, has increased from 152,000,000 ton in 1890 to 279,000,000 tons in 1900, and 668,000,000 tons in the year 1914. The trend, in average working time of the mines, is shown in the lower portion of Chart No. 2.

The surplus of capacity which I have described, and which very clearly existed in the pre-war years, had the effect of forcing intense competition among coal operators. It was relieved only occasionally by car shortage or a strike. Competition made it difficult for operators to maintain reasonable labor standards. Whether the

standards were reasonable or not did depend on whether you think the record, in itself, reasonable; but there can be no doubt about the difficulty experienced by employers in maintaining such standards as then existed.

During this period it was possible to get jobs in the mines, and the rates of wages were sufficient to cause men to enter employment, because you will note from Chart No. 2 how the number of workers increases. There was a rapid increase in the number of men working in the mines, but the employment was intermittent and the average man, between the years 1890 and 1914, was offered about 217 days during the year. Accident rates in the mines were high, as they still are. The use of rock dust to control explosions was not then known, or at least not practiced, and hardly a year passed without a horrible disaster.

The trend of the daily wage rates in the years before the war is indicated in Chart No. 2. I have selected for plotting in this chart the union day wage scale for inside labor, the occupation of trackman, which is one of the skilled occupations, in the State of Illinois. In the year 1900, the day wage rate was $2.28, and it increased slowly, with one recession, from 1904 to 1906, to $2.85 a day before the World War.

In the year 1913 the rate in effect for inside skilled labor was $2.85 in this state. The mines of the State operated 189 days in that year. One can get a rough indication of the earnings of an average day man by multiplying the daily rate by the average number of days worked by the mines. The answer is $540 for the year's work, and that in a year when business in the coal industry, on the whole, was quite as good as normal. The increase in the day wage rate from 1900 to 1914 amounted to 57 cents.

In this pre-war period there were strikes of labor, or labor disputes, as indicated by the statistical record maintained by the Geological Survey at that time. I ought to explain the basis of that record. Every operator was asked, in his annual report, were there any strikes at the mine during the year? If so, how many men were on strike, and how many days did the strike last, exclusive of Sundays and Holidays?

The operator's reply is obviously an ex parte statement, in the sense that it came from one party to an industrial dispute, and could not be submitted to the other for verification. It is clear also that an operator might report as a strike a labor dispute that was really a lockout, and in later years I have followed the practice

of indicating that these records represent losses of time on account of all labor disputes, not merely strikes, but lockouts and suspensions. "Suspension" is the term used in the industry for a stoppage of work at the expiration of a wage contract between employers and employees, when the two parties were unable to agree on the terms of renewal of that contract.

During these pre-war years labor relations in the industry were unstable, as is indicated by the statistical record. Aside from petty strikes involving a single mine, there were a number of major suspensions, which shut down several fields in several States at one time, and there were a number of strikes in districts arising over the attempt of the union to organize the non-union fields.

With reference to suspensions, the employers and the employees in the organized districts had adopted a system of two-year wage contracts, which expired in the even years. It proved very difficult to negotiate the renewal of those contracts, largely because of the competitive pressure of one field against another field, and particularly because of the competition of the non-union districts against the union districts.

The lower part of Chart No. 2 shows, in this black segment, the amount of the working year, for the country as a whole, which was idle on account of strikes, lockouts, and suspensions. You will note that the incidence of labor disputes falls, with curious regularity, in even years, and that in the years between the negotiation of the wage contracts, when the contracts were in force, there was comparatively little of interruption due to labor disputes. That runs from 1899 to the last year of record, which is 1933. It is an annual average for all mines in the country. Naturally, in the districts that were directly affected by the labor dispute, the time lost on account of the dispute would be much greater than the national average shows.

During the odd years, the loss on account of labor disputes was relatively small, because most of the loss of time arose in the suspensions accompanying the termination of the wage agreements.

The suspension of 1906 was one of the greatest disputes in the history of the American bituminous industry. In that year 241,394 men were technically out on strike, or some other labor dispute, and almost all of these were known to have been involved in the great suspension which began on April 1. This suspension affected mines in 10 states. In the State of Pennsyl-

vania there were 59,593 men out during the year 1906, for an average of 66 working days. In Ohio there were 37,636 men out for 71 days. In Michigan there were 3,340 men out for 88 days. In Indiana there were 15,875 men out for 63 days. In Illinois there were 49,792 men out for 58 days. In Iowa there were 7,969 men out for 28 days. In Missouri there were 6,212 men out for 78 days. In Kansas there were 11,827 men out for 59 days. In Oklahoma there were 7,372 men out for 72 days. In Arkansas, a small coal producing state, there were 3,828 men out for 76 days.

In this suspension of 1906, most of the men that I have enumerated went out simultaneously, so that the suspension was in effect, not necessarily continuously over the entire period, but it was in effect simultaneously in 10 States.

In 1908 there occurred another suspension, which again affected several States. In the central competitive field, which included western Pennsylvania, Ohio, Indiana in round numbers, there were involved 132,000 men, and it affected, again, a number of States.

The year 1909 was a year of peace. When the wage agreement expired in March, 1910, there occurred another large suspension, in which 12 States were affected. In these 12 States there were, in round numbers, 211,000 men involved in labor disputes that year, and the duration of these disputes ranged all the way from an average of 45 days working time in Pennsylvania to 157 days in Missouri.

There were lesser suspensions in 1912 and in 1914. The statistics which have been cited relate to what the industry terms "suspensions" rather than strikes. The wage contract had expired and the parties were unable to agree on the terms of renewal at some time during this period. The statistical record shows a different type of dispute occurring in connection with attempts to organize the non-union fields. These strikes for recognition, instead of affecting a number of States simultaneously, generally affected one field at a time.

In 1902 the record shows such a strike, or group of strikes, in southern West Virginia. In that year 18,129 men were reported by the operators as being on strike for an average of 75 days. In Alabama two strikes of local importance occurred, and 6,0[illegible]men were out for an average of 23 days.

In 1903 there was again a strike in Alabama, involving 7,319 men for 32 days.

The other significant strikes of this type, involving an effort to organize a non-union area during this period, included a dispute in Colorado from 1903 to 1904, and a dispute in Alabama in 1904.

In 1912 and 1913 there occurred a strike for recognition of the union in the Paint Creek and Cabin Creek districts of the Kanawha Valley of West Virginia, which was accompanied by bloodshed and declaration of martial law, and led to an investigation by the United States Senate. The strike in Colorado in 1913 was accompanied by calling out the militia, and by the so-called Ludlow Massacre, leading to the intervention of Federal troops, and another Congressional investigation.

The war resulted in a shortage of coal, and a marked increase in price. The average price f.o.b. mines rose from $1.30 a ton in August of 1916, to $4.18 a ton in February of 1917. These data are shown in Chart No. 3.

Spot price represents sales on the open or free market, as opposed to sales under contract. At any one time a large fraction of the output of coal will be moving on contract, the proportion of spot and of contract varying from field to field and from time to time. It is commonly said in the industry that approximately 25 per cent of the tonnage moves on the spot market and approximately 75 per cent on the contract market.

These figures are based upon trade journal quotations, taken from the best and most useful of the trade journals, including the Coal Age and the Black Diamond. It is necessary to rely upon trade journal quotations for the measurement of spot price fluctuations because it is very difficult to obtain information of an adequate character in any other way. The trade journal correspondent visits both the buyer and the seller in the field and matches up what the buyer tells him about the price he is paying and what the seller tells him as to the price offered. On the whole, spot price quotations from trade journals tend to be slightly above the market, if anything, in periods of depression because of the reluctance of the reporting operator individually to disclose the full extent to which prices have been reduced.

Spot prices tend to rise very much above contract prices at times of acute shortage. They tend to fall somewhat below contract prices during periods of dull market. The operators average realization for the year would, of course, be a composite of his spot business and his contract business. The average realization or average value per ton f.o.b. mine is shown in Chart No. 1, and in the accompanying table No. 1-A.

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The primary cause of the so-called coal shortage during the war period was congestion of railway transportation. At no time during the war was there any lack of physical mine capacity. And only for a brief period in the fall of 1917 did labor disputes exercise a serious restraining influence on the national output of coal.

Coal mines are dependent upon continuous flow of cars for f.o.b. at mine in order that the operator can ship his product. Even at the present time, when motor-truck traffic has largely increased, only about 4.6 per cent of the total output of coal is handled in trucks, and that part which is sold commercially moves almost entirely in railroad cars.

During the war a number of factors combined to create a congestion of transportation and to prevent the railroads from delivering what cars the mines needed to fill their orders.

In part, the breakdown of railroad transport was due to increased volume of business pouring into the United States from the war orders of the allies. War orders dealt largely in heavy industry products, involving a large consumption of coal, and there was an increase from 500,000,000 tons demand in 1916 to 550,000,000 tons demand in 1917, and to an all-time peak of 579,000,000 tons in 1918.

In other words, the increase in coal production threw an increased burden on the railroads. At the same time other commodities were flowing in increasing volume, and the traffic congestion was especially severe in Northeastern United States, where the munitions contracts and heavy coal-consuming industries were located.

At the same time the price had increased in the way indicated in the spot price diagram. This led to the opening of more than 1,000 new mines. In the year 1916 there were 5,726 commercial bituminous coal mines in operation, not including the country coal banks. In 1917 the number had jumped to 6,979. The increase in the number of mines added to the burden on the railroads, because it was necessary to place cars at a large number of points of origin.

During the war the control by the Federal Government of distribution of coal became imperative. I was attached to the Committee on Coal Production, Council of National Defense, which attempted to handle the problem during the early months of the War. And later I was detailed to assist the statistician in charge of coal in the United States Geological Survey, and who was at

the same time functioning as Chief Statistician of the Fuel Administration.

The Committee on Coal Production did what it could to take care of urgent needs by granting priorities, certain coal which was available to those who had the most urgent need for it. They attempted to control prices by voluntary agreement of producers with the Secretary of the Interior.

But the levels at which prices could be fixed by voluntary agreement proved unsatisfactory to the consuming interests, and consumers induced the Congress of the United States to include in the Lever Act a provision authorizing the President to fix prices for coal f.o.b. mines, and to control distribution.

The President set the prices August 23, 1917. The Fuel Administration assumed office September 1, 1917. The program ultimately adopted by the Fuel Administration was primarily one of saving coal transportation, thereby making it possible for the railroads to handle the increased demands of consumers for coal, and at the same time to handle the other burdens of traffic arising out of the War.

The steps taken were briefly as follows: As the problem was one of cutting down the number of car miles to be handled by the railroads as far as possible, the country was divided into thirteen consuming zones. The coal fields were divided into 27 producing districts. A budget was set up allotting to each district certain tonnages to move to each consuming area.

The general technique of those zones lay in warping toward the East as far as possible the supply of coal arising from the western fields, and making available for the eastern markets the coals that were produced in the East.

Certain eastern coals were zoned out of the Middle Western markets in order to cut down the length of haul and increase the turning point of cars and releasing the railroads, and thereby increasing the total volume of coal traffic that could be handled.

Exceptional cases requiring special coals were taken care of by a permanent system, so that a by-product coke plant in Illinois might receive Pocahontas coal when other consumers, who did not require it in Illinois and could get along with the local coals mined in Illinois and Indiana, were not permitted to have a special permit.

The net result of this regulation of the distribution of coal was to make it possible for the railroads to handle

the war traffic. The total output of bituminous coal rose to 12,000,000 tons or more a week during the middle of 1918. The national output for the year was the highest on record, a record never equaled since, and on the day of the Armistice consumers had been supplied with stocks of 63,000,000 tons of coal, which was twice any preceding known stock, and quite sufficient to carry them through a war of indefinite duration.

A disperity is noted on Chart No. 1 between the upper line representing capacity and the lower black line representing production during the period from 1919 to 1923. An explanation of this is that the capacity increased far in excess of any increase in requirements, because in the period of shortage it drove prices to heights and made coal mining a highly profitable business during two distinct periods. That led to the opening of more thousands of coal mines, and to an extension of those mines which were in operation. The increase in capacity was a reflection of the very great increase in price. The average value per ton rose to approximately $3.75 during the year 1920 because of the runaway market which occurred that year. The price was again high in the year 1920 in connection with the great strike and the further difficulties at that time. It was this increase in price which led to the opening of thousands of new mines, and to an extension of capacity in mines already in operation, and which brought about an inflation of the total mining capacity as of the year 1923 to 970,000,000 tons as against a demand in that same year that would represent 560,000,000 tons, as I recall the figures.

There was an acute shortage of coal in the years 1919 and 1920. This shortage began with the strike effective November 1, 1919. Other factors continued to make the market disturbed and the shortage persisted until the late fall of 1920 and early part of 1921.

The Federal Government took action in connection with that shortage. When the strike broke in November, 1919, the Government restored the regulations of the United States Fuel Administration under the Lever Act, and put into effect the schedule of prices which had been fixed during the War, delegated to a central coal committee, and in the face of the breakdown of the railroads, it forced the Fuel Administrator to distribute coal, and he took possession of what coal was on wheels and proceeded to distribute it, to distribute a limited supply to the consumers who were most in need.

At the peak there were 415,000 men on strike, involv-

ing 22 states. The strike lasted approximately 6 weeks, being settled on December 16th.

In the week before the strike, consumers had been purchasing 13,300,000 tons of coal, in a last-minute effort to build up their reserves. In the first week of the strike, the output was 3,600,000 tons, and it rose slightly thereafter. But at no time during the strike did it exceed approximately 5,000,000 tons a week, an amount which was entirely insufficient to meet the current consumption of the country.

The consumer was protected as far as price was concerned by the reinstatement of the wartime Fuel Administration prices. But many consumers found it difficult to get coal. Toward the end of the strike industrial plants along the Atlantic Seaboard began to shut down and schools in New York and elsewhere were closed, and the settlement of the strike became absolutely necessary.

The shortage lasted from the beginning of the strike to the end of the year 1920, in all some 15 or 16 months. After the strike had been settled but before consumers had succeeded in rebuilding their customary stocks of coal, another cause of shortage appeared.

That was an outlaw strike of railway switchmen, which began April 1, 1920. This strike largely congested the terminals of the principal coal-carrying railroads, and coal delivering railroads, in the area north of the Ohio and Pontomac Rivers, the great industrial center of the United States. That led to an acute shortage of cars at the mine, which lasted in its sharpest form for two or three months.

At the same time there was a period of another cause of shortage. The British Government had found it necessary to place a limitation on customary exports from the United Kingdom. As Great Britain was the chief supplier of the world's export trade, this action had the effect of creating an extremely active demand for the export of American coal.

These three factors acted in combination. Their result was to drive up spot prices of coal to an average for the United States at the peak of $9.51 a ton. The average, however, concealed the fact that along the Eastern Seaboard, where the shortage was greatest and the demand was most important, sales of $20 were reported. The average spot price of Pocahontas coal, according to trade journals in the month of August, was $12.90. The average price of Somerset mine-run coal was $11.97.

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I should like to add in the interest of clarity and justice to coal operators, that these prices were not obtained by all shippers, and that the average sales realization for the year, contract and spot business, for the country as a whole, was $3.75. It was a very handsome sales realization, but it was obviously much less than the average spot price sales for the year.

There was a coal shortage during the years 1922 and 1923. The cause of that shortage was a great strike—or it should properly be called suspension—affecting all the union mines and the non-union mines in a number of districts, in the bituminous coal fields, and a simultaneous suspension affecting the anthracite mines. In this strike 460,000 bituminous miners went out, and 73 per cent of the productive capacity of the bituminous coal fields were shut down. At the same time 142,000 anthracite miners went out. The strike began on April 1, 1922, and lasted officially in all districts until August 16th, when there was signed the wage agreement at Cleveland. Thereafter other districts accepted the agreement, and most of the mines were back at work in September.

I should add that the effects of this strike were accentuated by a simultaneous walk-out of the railway shopmen. The shopmen's strike began on July 1, 1922, and had the effect of creating a further shortage of cars in the non-union fields and a slowing up of the movement of coal out of the southern districts, over the great southern railroads. The two forces combined to produce a shortage in that year, and resulted in an average spot price f. o. b. mines, at the peak, of approximately $6 a ton.

The effects of this shortage on consumers were enormous. It had the effect frequently of compelling the consumer to accept dirty coal, impure coal, which he found it rather difficult to use. It had the effect of compelling him to accept coal from unaccustomed sources of supply, coal which was not always suitable to his requirements. There were enormous engine failures on railroads as a result of inferior coal which they were compelled to utilize at that time. Consumers had to put in heavy stocks of coal in anticipation of shortage, becase a probable strike was known for some weeks in advance. Stocks at the beginning of the strike of 1922 were approximately 60,000,000 tons, which is perhaps 30,000,000 tons above what it might have been had there been no strike in sight at the time. The principal cause of complaint by the consumer was, of course, the increase in price.

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As of the year 1920, according to the record of the Interstate Commerce Commission, Volume 61 of its reports, page 763, the average cost of bituminous coal purchased by the carriers per net ton at the mine, on the contract market, increased from $2.56 a ton in 1919 to $3.22 a ton in 1920. The average cost per net ton purchased on the spot market, which of course was the market reflecting the greatest increase in price, rose from $2.83 a ton in 1919 to $4.53 in 1920. The shortage was most acute in the region served by the New England railroads.

The developed capacity of mines increased, as I have indicated, from 730,000,000 tons in 1918 to approximately 970,000,000 tons in 1923. This was accompanied by an increase in the number of mines, as indicated in the curve on Chart No. 2. The number of mines rose from approximately 8,200 in the year 1918 to 9,330 in 1923.

The opening of these new mines, and the extension of existing mines, led to a recruitment of a large number of men. The number of men employed rose from 615,000 in 1918 to 705,000 in 1923. In 1923 those men averaged 179 days; that is to say, the mines were in operation an average of 179 days. The wage rate increased to $7.50 a day in fields in the Illinois district, which was roughly typical of all the organized fields. The increase became effective in August of 1920.

I have already stated that the Federal Fuel Administration was restored during the year 1919. The Federal Government took other action in connection with this period. In 1920 use was made of the powers of the Interstate Commerce Commission under the Transportation Act to declare priorities in the movement of coal. Those were in part geographical priorities to facilitate shipment of coal to areas of the country that were in particular need, and in part some classification priorities directing the shipment of coal to those branches of consumption which it was felt were in particular need.

During the strike of 1922 another attempt was made to utilize the priority powers of the Interstate Commerce Commission, at this time associated with an attempt to negotiate voluntary agreements to restrain prices f. o. b. mines. A presidential fuel distribution committee was set up to advise the Interstate Commerce Commission in the application of priority powers, and in September of 1922 an Act of Congress was passed known as the Federal Fuel Distributor Act, which was intended to validate the procedures used prior to that time by the Interstate Com-

merce Commission, and to advise the Commission as to which areas of the country and which branches of consumption were in particular need.

Action was also taken by several States in connection with this shortage. In 1920 the Legislature of Indiana passed a special food and fuel commission act, setting up a commission and instructing it to set maximum prices on coal produced in the State of Indiana for intrastate shipment, to consumers in Indiana, and authorizing and directing the Commission to distribute coal, at this maximum price, to domestic consumers and to other classifications of consumers in particular need.

By referring to Chart No. 1, you will note variations in the line indicating production from the year 1923 down to date. The variations indicate a general change in trend. The chart indicates a steadily rising trend up until 1918, and then the line goes off practically horizontal until 1930, and falls off after that. The fluctuations from year to year in the curve of production represent primarily the ups and downs of the demand for coal, as it is affected by the conditions of general business. In some years the production is not exactly equivalent to consumption because of changes in stocks. In a year like 1919 there may be a considerable draft upon storage in the hands of consumers that does not make it necessary to produce quite as much as the yearly consumption, but if one were to plot the consumption curve alongside the production curve, he would find that it was substantially the same, with the exception of 1919, 1922 and 1923.

In 1919 the effect of the great strike of that year was to deplete consumers' stocks, and consumption in that year was greater than production. In 1922 there was a similar effect. Consumption was greater than production. Production was actually curtailed by the strike.

In 1923 there were some additions to storage, so that consumption was less than there indicated. But, in the main, the movements up and down reflect the ebb and flow of business in the fuel-using industries. The reasons for the change in the general trend of demand which is so noticeable after 1918 are, briefly, as follows:

Prior to 1918 demand had been increasing steadily at a rate averaging 13,000,000 tons a year. Thereafter it flattens off, and at no time since the war has the demand actually reached the war peak. The first factor in that slowing down of demand was a change in the fuel-using industries themselves, particularly in the iron and steel industry. As the country matured in its economic development, there was a tendency to pass from the produc-

tion of crude materials, like crude iron and steel products, to more fabricated materials, and there was also going on in the iron and steel industry a remarkable substitution of scrap for virgin pig iron. The result was that while formerly the demand for coal in the manufacture of coke, and consequently of iron and steel, had been growing very rapidly, it now begin to flatten off. The iron furnaces were supplemented by this flow of scrap coming into the steel mills. Not so much coke was needed, and not so much coal was needed. That is one of the major causes of the flattening of demand, reflecting primarily the accumulation of scrap, and of importance because the iron and steel industry, next to the railroads, was the largest single consumer of coal.

The second factor was fuel efficiency. Fuel efficiency had been improving since the first invention of the steam engine, but along about the time of the war fuel economy became an organized movement. The lead in that movement was taken by the electric utilities. It was stimulated by the high prices of fuel, associated with war, and the reduction in the unit consumption of fuel which has been accompanied by the fuel engineers in the period since the war is notable. With steam railroads, from 1919 down to the end of 1933, the reduction in the average requirement to move 1,000 gross ton miles of freight was 28.8 percent, since the war. In the electric-power plants the reduction in the amount required to generate one killowatt hour of power was 53 per cent since the war. In the iron and steel blast furnaces the reduction in the amount of coking coal necessary to smelt one ton of pig iron was 19.6 per cent. In the meantime, the by-product oven was saving great quantities of fuel that had formerly been wasted out of the beehive coke ovens; and that saving also turns out to be approximately 19 per cent of the total fuel input of the by-product oven. Averaging together all branches of industry and transportation, it is safe to say that the economies effected since the war are between 20 and 30 per cent. In my judgment that is the largest single factor in the slowing-down of the former growth of coal demand.

A third factor, of course, was the competition of other fuels and of water power. The federal water-power act, passed in 1920, had opened up a lot of new power sites to public development and there was rapid development. Oil and gas continued to increase in production. Probably the greater part of the oil and gass that have been produced during the last decade has in no sense come into direct competition with coal. Much of it is either

used in the field for the production operations, drilling the wells and pumping them, or in is used out on the Pacific coast, where coal could not compete, or it is refined and goes into lubricants, with which coal could not very well compete as a source. Also it goes into gasoline, which, at anything like present price levels, coal cannot make. Only a minor fraction of the total increase of the production of oil and gas capacity was directly competitive with butuminous coal, but every coal man knows that it has been a factor, and that business has been lost both to fuel oil and to natural gas.

The net result of these changes was to convert an industry that had for 100 years been used to a steadily growing demand, and had based all its plans and expectations on a growing demand, into an industry that was faced with a stationary demand, and that tended to bring about a very difficult readjustment.

The fact that the demand had stopped growing meant that the tremendous increase in capacity which had taken place during the war was now clearly not needed. Beginning in 1924, the causes of shortage which had hitherto prevented the mines from producing in a period of shortage, were eliminated. The car shortage largely disappeared on the railroads, through improvements in railroad transportation. The signature of the three-year wage agreement between the miners' union and the operators eliminated the prospect of strike for three years.

Under those conditions there was nothing, in effect, present to prevent the surplus capacity which had been created in the shortage years from exerting its full effects on the market. The capacity, being up at 970,000,000 tons, and demand, stabilized at around, let us say, 530,000,000 tons, were so clearly out of balance that a long and very difficult liquidation became inevitable. That has had the effect of intensifying competition, and of putting great pressure upon prices and upon wages.

In the year 1926 the bituminous coal industry benefited by outside circumstances which threw it extra business. Late in the fall of 1925, and continuing through the early months of 1926, the anthracite miners of the United States were on suspension. It lasted about five months, and a large volume of tonnage which was normally supplied by anthracite was transferred to the demand for bituminous coal.

Later, in the year 1926, the British miners were on strike. They were out for perhaps nine months, and the shortage in the world's export trade created by the with-

drawal of British coal during that period threw a windfall of extra business to American shippers who could participate in the export trade.

Those two factors account for much of the increase in tonnage which the bituminous trade of the United States experienced in 1926, as compared to the year before or the year after, and temporarily stiffened prices.

You can see the effects of this combination of the anthracite strike and the British miners' strike in the record of spot prices for that year. In Chart No. 3 it is shown that in the fall of 1926 spot prices sprang from a level of about $2 a ton to $3.20 a ton, for a brief period.

The effect of the deflation heretofore mentioned was a very drastic liquidation of both mines and plant capacity. The number of operating mines between 1923 and 1932 fell off from 9,331 to 5,427. The drop in the number of mines is indicated in the top curve on Chart No. 2. These properties are commercial mines, not country coal banks, not little wagon mines—mines producing a thousand tons a year or more.

Some of this reduction, of course, might be attributed to the effects of the depression of general business, but even if one compares the number of mines operating in 1923 with the number operating in 1930, he finds that there is a net reduction of 3,440 mines during those years. This net decline in number of mines does not measure the total number of mines that have been abandoned or kept down or otherwise forced out of business. It is merely the net change in those years.

In the meantime there has come into existence a very considerable number of small trucking mines, utilizing hard roads and motor transport. Mr. Newell G. Alford, a mining engineer, in a paper published in the Transactions of the American Institute of Mining Engineers, presents a study of the records of individual mines on the books of the State mine inspectors and he treats the individual cases, 4,800 properties or more, which had been forced out of business since 1923, and concluded that exhaustion of the coal accounted for a very small part of this reduction. There were corresponding effects upon the plant capacity in operation. The total capacity declined from 970,000,000 tons to 770,000,000 tons in 1929. That is a reduction of 200,000,000 tons of active capacity. That, again, does not measure the full extent of the deflation on the bituminous coal mining industry. It is merely the net change in the capacity. Meanwhile, a number of new mines had come into existence, and the old mines had expanded their

production. Out of these several thousand mines that have been closed down since the depression began in the bituminous coal business in 1923, there are large numbers that are now idle, but not finally abandoned. The Bureau of Mines made an effort to determine the importance of those idle but not permanently abandoned mines, and, as of 1930, we found that there were on our books 1,359 mines of this class, shut down, out of business for several years, but not yet finally abandoned by their owners. The capacity of those mines, when they operated, was 130,000,000 tons a year. I have made an earnest effort to find out the status of these mines, idle but not permanently abandoned, because we are frequently asked the question, "What effect do they have upon the market capacity of the industry, and how many of them might go back into production if there were a great increase in prices?"

The evidence that we have been able to collect on the subject indicates that they include an appreciable number of properties that, if there were any sustained advance in price, would come back into the market. They include also many hundreds of mines in all states of collapse and disrepair, which, in the phrase of one coal operator, nothing but a World War would ever bring back into production again. No one can tell, therefore, how far shut down mines, not formally abandoned, ought to be reckoned within the production capacity of the industry. If you counted them all, and decided that they should be included, their total capacity, as of 1930, would have been 960,000,000 tons plus 130,000,000 tons. Most of that is known to be so far out of repair and so hopelessly damaged by the long shut-down that it could not come back. Some part of it possibly could.

The existence of this idle-capacity in shut-down mines is a further reason for the long-continued depression in the coal market. The presence of these properties and the possibility that they may reopen is one more factor tending to intensify the competition, to beat down prices, with the consequent results.

It is important also to know how far these shut-down mines—1,355 in 1930—are still in the picture. I have just had a test made of three of the principal States. We find that in those three States as of 1930 there were 291 mines in this class, shut down but not permanently abandoned. Of those, 203 have since been dropped from our records. So far as we can tell, the owners consider them permanently withdrawn, but there remain 88 in these three States that are still in the class

of shut-down but not permanently abandoned, which conceivably, might go back into production, and which go, among other factors, to create the difficult competitive situation that this industry faces.

The effect of the described condition upon profits and losses in the industry has been to transform a large profit during the days of the prosperous years into a heavy and continued loss, later. The evidence on this point is the income tax returns published from time to time, or made available by the United States Treasury. The Treasury data which are at hand have been checked up in the lower portion of Chart No. 1. The years of profits are shown in black and the years of deficit in red.

The data have been made up into a table which I have here, marked Table No. 7, attached hereto.

The Treasury data available for the years 1917 to 1921 are not entirely complete, and the profit showing for those years is therefore somewhat less than the industry as a whole actually enjoyed. Briefly, they show that in the year 1920 the excess of net income of the corporations making an income, over the deficits of those that lost money, was $249,000,000-odd. There was a net credit balance also in the year 1921, when business in general in the United States was depressed. Data are lacking for the intervening years until 1925.

The question marks appearing on chart No. 1 for the years 1922, 1923, 1924, 1926, and 1927 are merely to indicate that the Treasury had published no separate data regarding bituminous coal for those years, but in those years the Treasury combined anthracite and bituminous, and the combined showing of the two industries for the year 1922 shows a net of $70,000,000, and the combined showing for the two, anthracite and bituminous, in 1923, shows a net of $67,000,000. That is to say, an excess of net income, for those corporations that reported net income, over the deficits of those corporations that reported a deficit.

From observing that fact, and recognizing also that spot prices and sales realizations were relatively higher in the years 1922 and 1923, it seems an inescapable conclusion that if the data for bituminous coal had been separated from the anthracite, they would have shown some excess of income over deficit in those two years.

Similarly, in the year 1924, the Treasury's combined record for anthracite and bituminous shows a loss, an excess of deficits over net incomes, amounting, for the combined industries, to $49,000,000. That, taken together with the fact that there was a drastic liquidation

in the number of mines and capacity in the year 1924, and that prices of coal were known to be falling in that year, appears to indicate that all the losses for the combined group could not possibly have been due to anthracite.

During this period of which we have been speaking, 1923, to 1933, wage rates have been declining, as a whole, and over the period as a whole.

The extent of the decline, and the dates at which it took place, are indicated in the charts of wage rates and earnings given in chart No. 2. The chart shows three different indicators of the trend of miners' wages. This does not purport to show the annual earnings of miners, but merely daily rates or daily earnings.

The first of the indicators selected to show what the trend has been is the Illinois day scale, for skilled inside labor, to which reference has already been made It is indicated by the dotted line on chart No. 2.

As the Illinois district was completely organized throughout this period, wage rates in that field have changed by sudden steps at periods when there was a change in the wage agreement. In the Illinois field, as of 1923, the day rate was $7.50 a day, the point which it had reached by wage agreements in August, 1920. The miners' union in that area remained strong enough to hold it at the $7.50 level down to late in the year 1928, at which time, due to the competition of other districts, and particularly of the non-union fields, it was forced down to $6.10. It remained at the level of $6.10 for a period ending in 1932, and then dropped to $5.

The second indicator of the trend of wages shown in this chart, and selected merely to indicate a change from time to time, is the average earnings of all day men in the State of West Virginia, covered by the periodic wage surveys of the United States Bureau of Labor Statistics. The Bureau of Labor Statistics cannot attempt to cover all mines, but it has selected an example covering a considerable number of mines in each State, and at intervals of two years it makes a close examination of the books of those mines to find what have been the average earnings during one typical pay period. For the State of West Virginia the record compiled from these publications of the Bureau of Labor Statistics is as follows:

The sample made in 1919 shows the average earnings of the day men were $4.09. They rose to a high of $5.87 in late 1921 and early 1922.

The next observation made by the Bureau of Labor

Statistics, in 1924, shows that they had dropped to $4.93. They stayed at that level, with slight reductions, until the beginning of the great depression, and in February, 1933, the Bureau of Labor Statistics sample showed an average earning of all day men in West Virginia mines covered of $3.25. It is significant that the drop in the daily earnings, which means essentially wage rates, in the State of West Virginia, came four years before the drop in the Illinois rate, indicating the competition to which the northern districts, as represented by the State of Illinois, were subjected during this period.

The third barometer of wages indicated on this chart is the average daily earnings in the State of Tennessee for day men, also developed from the Bureau of Labor Statistics. The Bureau seems not to have made any canvass of Tennessee mines in the years 1921 and 1922, so the chart shows the record beginning with 1924.

In their 1924 determination the Bureau of Labor Statistics found the average for Tennessee, on this selected payroll, to be $3.55, and that fell, by degrees, to $2.66, *in early 1933.*

The working time tended to increase for a while, due to the fact that the number of men on the rolls had been drastically reduced by the discharge of about 200,000 workers between 1923 and 1930. The drop in the number of workers is shown in the line marked "Then Employed" in chart No. 2. With the elimination of these 200,000 men that lost their jobs—This is the number of jobs, not the number of individuals.

The fact that these men were forced out of the industry, and that the mines in which they worked had also shut down, made it possible for the remaining mines to operate far more steadily, and the average working time for the mines that remained in business increased. It rose from 179 days in 1923 to 219 days in 1929. The figure of 219 days in 1929 is still less than the average.

The average working time in 1929 was somewhat less than the average working time in 1913, the last prosperous year before the war. What a man could make in the course of a year depends on his daily rate, and on the amount of time that he has to work.

During the prosperous years before the reductions in wage rates, there were masses of men in the mines who earned in the neighborhood of $1,100 or $1,200, and some, of course, who earned very much more than that, and some who did not make anywhere near as much. You can get a rough picture of what these day men would be making in the year 1932 if you take the Bu-

reau of Labor Statistics' findings as to their average earnings in the month of February, 1933, and multiply that by the number of days the mines worked in 1932. If you make that computation, the result is as follows:

In West Virginia, the product of days times the February, 1933, rate, would be a yearly income of $546. In Illinois, if you take the days times the union rate, $5, the annual income would be $560.

In Tennessee, if you took the Bureau of Labor Statistics' findings as truly representative, the annual earnings would be $394 paid in that area.

These are the day men, not the tonnage workers. The tonnage workers sometimes make less, and often make more.

I ought to add that the Bureau of Labor Statistics' samples are thoroughly comparable, from time to time, but, in my judgment, may not show the full depths to which the reduction of wages went during the years of the depression. The list of mines has been brought to my office for checking. I have examined the mines that are counted by the Bureau of Labor Statistics in its findings for the States of West Virginia and Tennessee. They include a number of large mines. They are heavily weighted by the bigger mines, and especially by the captive mines. On the whole, those mines have maintained wage scales rather better than the little properties. It is therefore more than possible, in my judgment, that a complete count of all the mines in the State of Tennessee would have shown average earnings per day materially less than $2.66 in February of 1933. I think we all of us have seen mines where rates were lower than that figure.

I refer now to a table entitled "Disposition of total output of bituminous coal mines of the United States, by years, 1915-1933," marked Table No. 8, attached hereto. This table was prepared under my direction from data in the Bureau.

The first column is the year. The next column is "Loaded at Mines for Shipment." That is to say, loaded at the mine in a railroad car, or in a few local instances in a river barge, for shipment by rail or river.

In the next column, is the percentage that that item bears to the total production in the country.

The next column is "Truck or Wagon Commercial Sales." It will be noticed that there is no entry in that column until the year 1933. That does not mean that there was no coal loaded into trucks or wagons prior to that time.

Frederick C. Tryon

There have been wagon sales at least from the earliest times, but there was no separation made of them in the statistical records prior to this year, 1933, or 1932. They were included in the caption "Other Sales to Local Trade, Used by Employees, or taken by locomotives at tipple." In 1933 for the first time we obtained an accurate separation, which warrants a publication under the name "Truck or Wagon Commercial Sales." It was found that in 1933 that constituted 4.6 per cent of the total output of coal.

The next item "Per cent of Total" will speak for itself.

The next column is headed "Made into Coke at Mines." We have data in the Bureau showing what happens to that coke after it is made at the mines.

Virtually all the coke as it is drawn from the beehive oven at the mine is loaded into railroad cars, or very rarely into a river barge, and shipped away. According to our latest accounts, there are three coke-oven plants in the United States that are still using some coke they produce in an affiliated factory right at the mine. But for practical purposes, all the coal that is charged in beehive ovens at mines, either 24 or 48 or 72 hours later is loaded on railroad cars, or on a river barge, and shipped away.

This table shows the relationship between production and shipments.

I have before me a table entitled "Distribution of bituminous coal produced in 1929 according to the records of the United States Bureau of Mines, grouped by State of origin," which I have marked Table No. 9 and which is attached hereto.

I have also a chart entitled "The Interstate Movement of Bituminous Coal in 1929, as shown by the reports of the United States Bureau of Mines," which I have marked Chart No. 10 and which is attached hereto. The chart No. 10 is based upon table No. 9.

Certain additional details have been entered on this chart to indicate the distribution of coal shipped to tidewater, as to what States it is known to enter into, and certain additional details to show which of the New England States have received coal from the region of the districts represented.

I have also a chart entitled "Production of bituminous coal and total rail (or water) shipments, by States, in 1929," which I have marked Chart No. 11 and which is attached hereto. This chart is based on very familiar published data in the Annual Report of the Bureau of

Mines. The figures under the small heading on this chart represent production for that year in that State in millions of tons.

I have also another table entitled "Distribution of the supply of bituminous coal from each originating district in 1929, divided between interstate, intrastate and railroad fuel," which I have marked Table No. 13 and attached hereto. This table was prepared by me upon data of the Bureau of Mines, which was compiled under my direction.

I have also prepared, and attach hereto, a table comprising two pages entitled "Distribution of the total national supply of bituminous coal in 1929, divided between interstate, intrastate, and railroad fuel," which I have marked Table No. 14.

I also have prepared, and attach hereto, a table entitled "How intrastate rail shipments of bituminous coal to Indianapolis meet competition from interstate rail shipments (1929 data)," which is marked Table No. 15.

I have also prepared, and attach hereto, a table entitled "How intrastate rail shipments of bituminous coal to other large cities of Indiana, Illinois, and Ohio meet competition from interstate rail shipments (1929 data)," which I have marked Table No. 16.

This table is based upon the detailed records of two railroad traffic bureaus, one called the Ohio Bureau of Coal Statistics, and the other called the Illinois Freight Association. All cities carried on the books of the two traffic bureaus in such form that they could be matched up, say a figure from the Illinois Bureau be placed alongside a figure from the Ohio Bureau, were used in this compilation. Then there was a certain lumping of destination groups, all in Illinois and all in Indiana and they were left out as having no significance.

I also attach a table, prepared under my direction, entitled "Bituminous coal loaded for rail shipment on origin railroads in the Appalachian districts north of Alabama—Northern Railroads," which table I have marked Table No. 17.

I also attach a table, prepared under my direction, entitled "Bituminous Coal Loaded for Rail shipment on Origin Railroads in the Appalachian Districts North of Alabama—Southern Railroads," which table I have marked Table No. 18.

I also attach hereto a table, prepared under my direction, entitled "Recapitulation of Bituminous Coal Loaded for Rail Shipment on Northern and on Southern

Frederick C. Tryon Charles O'Neill

Railroads in the Appalachian Districts North of Alabama," which table I have marked Table No. 19.

The testimony of CHARLES O'NEILL, admitted in evidence under the stipulation is as follows:

I am Vice-president of Peale, Peacock & Kerr, Inc., miners and shippers of bituminous coal, with mines located in Indiana, Cambria and Clearfield Counties of Pennsylvania.

I am president of the Eastern Bituminous Coal Association, a voluntary, unincorporated association of coal producers with mines located in the following counties in Pennsylvania:

Bedford, Blair, Bradford, Cambria, Cameron, Centra, Clarion, Clearfield, Clinton, Elk, Forest, Fulton, Huntingdon, Jefferson, Lycoming, McKean, Mifflin, Potter, Somerset, Tioga.

Armstrong County, including mines served by the P. & S. R. R. on the west bank of the Allegheny River, and north of the Conemauch division of the Pennsylvania Railroad.

Fayette County, all mines on and east of the line of Indian Creek Valley branch of the Baltimore & Ohio Railroad.

Indiana County, north of but excluding the Saltsburg branch of the Pensylvania Railroad between Edri and Blairsville, both exclusive.

Westmoreland County, including all mines served by the Pennsylvania Railroad, Torrance, and east.

The State of Maryland; and Grant-Mineral and Tucker Counties in West Virginia. This association has 141 members, producers who in 1934 produced 37,822,549 tons of coal.

From 1898 until 1916 I was employed as a coal miner and held a position as an officer of the United Mine Workers of America.

From 1918 to 1930 I was Secretary of the Central Pennsylvania Coal Operators Association; since January 1st, 1930, I have been Vice-President of Peale, Peacock & Kerr, Inc. I have been actively engaged in the mining, production and selling of bituminous coal for approximately 35 years.

Coal from the Central Pennsylvania District is sold in 42 states and the District of Columbia, the Dominion of Canada and to Interstate carriers. The principal areas using our coal are the Middle Atlantic and New

England States, the District of Columbia and the coal sold to railways. The total of our production sold in New England, Middle Atlantic States, District of Columbia, and for railway fuel, amounted to 94.52%, the balance is shipped to all the other 42 states and exported to foreign countries and Canada.

Our district competes in each of these markets with practically every other coal district East of the Mississippi River, except Alabama, and with coal produced in the States of Pennsylvania (outside of our District No. 1) Ohio, West Virginia, Virginia, Kentucky, Tennessee, Indiana, Illinois, and Iowa. Our principal competitors, however, outside of our own district are the mines located in Western Pennsylvania District, Ohio, No. W. Va. District, and the Southern West Virginia Districts, Low and High Volatile. Our principal competition from the South is coal shipped from the Low Volatile and High Volatile Districts from Hampton Roads, which is distributed from there to points along the Atlantic Seaboard, and from docks re-loaded on to railroad cars and trucks and shipped to interior points. A complete description of this Tidewater origin and distribution is available from reports issued by the United States Bureau of Mines currently. We also compete with Northern West Va., West Pa., and Ohio in all-rail markets East of Youngstown, Ohio, to Points in Maine. Our district also competes with all of the Districts shipping to the Great Lakes for delivery beyond the dumping ports.

For several decades prior to 1910 the production and consumption of bituminous coal practically doubled every 10 years. In 1890 it was 111,000,000 tons; in 1900, 212,000,000 tons; in 1910, 417,000,000 tons; in 1918, at peak production in the industry, it was 579,000,000 tons. Since that time there has been no steady increase in the consumption of coal. As a matter of fact, whatever general tendency there has been has been in the other direction. The noteworthy thing, from the standpoint of the coal operators, is that the growth in consumption which had been uniform and steady prior to 1910, and which the industry had in general counted upon, quite suddenly ceased. This was due to several causes, but primarily to more economical methods in using coal practiced by the large users and to the increased use of competitive fuels and sources of energy, such as oil, gas and hydro-electric energy. This in a general way describes the growth of the industry from a consumptive stand-

point. The growth of the industry from the point of view of production or rather of development of productive capacity has been quite different. The increased demand and high prices existing during the War period stimulated the opening up and development of many new mines, and this tendency was promoted and increased by the Wartime Fuel Administration. The result was that in 1923 there were 9331 operating mines throughout the United States with a total productive capacity, if operated 308 days a year of 970,000,000 net tons. The production of coal during that year was 564,565,000 net tons, or only 58% of the developed capacity. The result was that the mines operated on the average of only 179 days during that year.

The practice existing in the industry relative to the relationship between the sale of coal and the actual mining of it is as follows:

Primarily, the establishment of a price is based upon the cost of production with the hope of an additional margin that will produce a profit. Of course, the competitive circumstances in the bituminous coal industry, due to excess productive capacity and the contraction and reduction in the consumption of coal due to competition from other fuels and sources of power such as oil, natural gas, and hydro-electricity, has intensified the struggle for orders, so that there is a constant surplus of offerings on the market. This, of course, has a tendency to depress prices.

The coal is sold in different ways. The larger companies usually sell their coal by direct solicitation of consumers by salesmen. A great deal of coal is sold through agents, and there is also considerable coal sold through middle-men or wholesalers who purchase for resale. Practically all companies do some business in each of the three ways, the bulk of the tonnage being sold by direct solicitation, and the character of the actual price on the contracts made by individual bargaining, taking into consideration the competitive circumstances on the day the sale is consummated.

After an order is obtained and accepted by the coal company, copy of the same with shipping instructions and so forth is furnished to the coal mine, upon which proper accumulation of orders for a day's run, fills the orders that are available so far as they can produce the coal on any given day. In the accumulation of orders where coal is sized, there is considerable difficulty in keeping a proper balance on the output of sizes at any given mine. The result is that after a number of days'

work if the screenings or finer coal is not moving readily in the market and the larger sizes are moving readily, which often occurs in the winter or heating season, accumulation of slack or screenings will finally stop the operation of the mine by filling the siding capacity of the mine. In such an event the operator to continue to sell and deliver on his contracts for larger sizes is compelled to try to move this slack into some market at a price that will move it.

As a general rule there are no storage facilities at the bituminous coal mines in the United States. This is largely due to the fact that coal deteriorates considerably on being stored and to the extra cost of handling necessitated by storage. The general practice is to load the coal directly from the mine into railroad cars. This means that the coal must or should be sold before it is actually mined. The general practice in the industry is to secure orders for coal and then to mine that coal to fill such orders and load it directly into railroad cars. The tendency in late years to sell coal by sizes complicates the general practice to a considerable extent due to the fact that in the mining and sizing of coal all sizes are made and if orders are on hand for one or two sizes only, some disposition must thus be made of the other sizes. This fact has caused a tendency on the part of some operators to load the unsold sizes into railroad cars and bill such cars on consignment to the various consuming markets. Unless this coal is actually sold by the time it reaches its destination it becomes subject to heavy demurrage charges which quickly eat up the value of the coal and forces the operator to sell the coal in an already glutted market at any price he can get for it. This is what is called "distress" coal, and the presence of such distress coal on the market has had a substantial effect upon prices.

There is no storage of coal at the mines in the Central Pennsylvania District. All coal mined is shipped, except the very small portion that may be used at certain collieries for the generation of steam for power, and practically all the coal shipped from the Central Pennsylvania district is shipped in railroad cars, except about a million and a half tons per annum that is distributed locally by trucks.

When sufficient orders are secured at a mine, arrangements are made each night for the placement of sufficient empty railroad coal cars for running the mine the next day. This is usually arranged by the mine office with the yardmaster of the serving railway carrier. When ar-

rangements have been made with the railroad for a supply of cars, notices are posted or other signal used to notify the mine employees the night before that there will be work on the succeeding day. If no railroad cars are available (which did at one time occur frequently but now only occasionally), the men are notified not to come to work the next morning. In other words, railroad equipment is essential to the operation of any of the coal mines in our district. There is no storage at the mine and there is no other place to put the coal except in railroad cars.

The effect of surplus capacity upon the price of coal has been generally as follows:

Excess productive capacity in the mining industry had been chronic for many years preceding the World War, but up until 1910 the industry was doubling its production every decade, so that the expansion of production facilities and development was required by the country's needs. Naturally, there was a considerable momentum in the development of coal fields at the time the curve of consumption began to flatten after 1910. This was occasioned, of course, by the history of the industry as stated prior to 1910, by the encouragement of railroads who up until the time of the World War were constantly making extensions into new coal fields, encouraging their development of the volume of this lucrative traffic that they might have placed upon their lines.

While over-capacity in the coal industry had existed for a number of years prior to 1923, prior to that time such over-capacity did not have any substantial effect upon prices largely because the actual productive capacity of any mine is limited by the ability of the operator to get railroad cars into which coal may be loaded. Prior to 1923 a shortage existed in railroad equipment and it had been generally impossible for mines to get enough cars to transport anywhere near their full-time operating capacity. As a result the sale of coal in those days was to quite a large extent a sale of transportation facilities, and prices were relatively high.

With the beginning of the World War and the tremendous purchases of munitions and materials by the Allied Nations from this country, there was a substantial increase in prices the latter part of 1916, and the projection of new mines was accelerated by the War boom as was the further development of mines then in operation by increasing the working of men on development work and the intensified application of the then

known mechanical devices and equipment to the production of coal. Prices went to a point where it was deemed necessary to place the bituminous coal industry under the provisions of a Federal Statute, the Lever Act, establish a United States Fuel Administration, which took charge of production and distribution of bituminous coal in the United States and fixed maximum prices at which the bituminous coal in the nation could be sold. The maximum prices fixed by the United States Fuel Administration were from Six to Eight Dollars below the then current prices obtainable in the market The United States Fuel Administration maximum prices obtained from August 21, 1917, until February 1, 1919, several months after the signing of the Armistice on November 11, 1918. Following the signing of the Armistice there was a very decided decrease in the demand for bituminous coal, and with the elimination of the maximum prices February 1, 1919, as established by the United States Fuel Administration, prices generally declined, until the latter part of the year.

As a result of the strike called by the United Mine Workers of America, which was effective on November 1st, 1919, to December 10th, 1919, supplies of coal were greatly reduced and the prices of coal in the non-union fields sky-rocketed to such an extent that the President reinstated the United States Fuel Administration for the period from December 1st, 1919, until April 1st, 1920. Maximum prices were again established under the Lever Act and strict regulations were made as to allocation, distribution and routing of railroad cars.

The post-war boom was beginning about this time, and in addition to the development of the inflationary booms in Europe, a serious shortage of transportation facilities developed in the United States, commonly known as coal car shortage at the mines. With the increasing shortage of cars and the resulting diminution of the coal supply, prices began to climb very rapidly after April 1, 1920, and by July 15, current prices for bituminous coal reached the unheard of heights of fifteen to twenty dollars a ton in certain cases. Current prices continued at very high levels until about December 31, 1920.

By 1923, however, the railroads had acquired ample car equipment and the transportation problem was cleared up. It was at this time that the over-developed capacity first became felt as a permanent disturbing market factor relative to the price of coal. A developed coal mine is something that is hard to close down. It is

generally surrounded by a more or less isolated mining community entirely dependent upon the continued operation of the mine. There is a large investment in plant and equipment and the overhead expense of an idle mine is very great. This overhead consists of such fixed charges as taxes, insurance, pumping, ventilation, maintenance, depreciation, administration and as a rule, in the case of mines on leased property of minimum rental or royalty payments. At a modern well equipped mine the cost of properly maintaining it in idleness will approximate 20c to 30c per net ton of developed capacity, so that the continuing cost of maintaining an idle mine with a monthly capacity of 50,000 net tons will approximate $10,000 to $15,000 per month. In addition, the shutting down of a mine for any considerable period of time generally results in a substantial loss of the actual coal reserves in the developed portion of the mine, due to the fact that certain coal becomes inaccessible because of caving and squeezes. The cost of mining also varies very considerably according to the number of days per week during which the mine is operated. The more continuous the operation, the lower the cost. There is, therefore, a natural tendency on the part of the Operator to keep his mine operating as continuously as possible, and, therefore, a natural effort is made to increase the volume of sales. This possibility of cost reduction by volume of output is the principal cause for price cutting; the Operator is forever asking himself the question—

> "'Can I save money by taking an order at a lower price than heretofore, through the reduction in the overhead or fixed charge per ton that will result from this additional tonnage?'"

The Operator seldom contracts at one time for the sale of the entire production of his mine, but having contracted for the sale of a part of his production he has the proverbial "bear by the tail," and finds himself in the position where he cannot refuse to accept additional business even at a price which is only slightly above *actual cash out of pocket cost of production*, including only such items as wages, power, supplies and royalty, in the case of a mine operating under lease. Naturally under these conditions with the large excess production capacity hanging over and pressing upon the market, it is inevitable that prices must decline in a downward spiral in the absence of some form of price control. Operator after Operator cuts the price in an attempt to

secure for himself a disproportionate share of the limited volume of available business. The inevitable result is a continuous decline in price until a national strike or some other abnormal situation develops.

The consequences of this fierce competition have been disastrous to the industry and may be more readily appreciated when it is realized that by May 1933, the average mine realization price in the Central Pennsylvania district had been forced down to $1.14 per net ton, thirty cents below the average cost of production, as determined by the statistics of the National Recovery Administration. This disparity between cost and selling price existed in spite of the fact that in the competitive process mine wages had been forced down to a point where in some localities men were working for $1.00 to $2.00 per day for only two or three days per week. To illustrate the extent to which prices had been depressed, railway fuel was sold under competitive bidding during 1932 as low as 43c a net ton. However, the price of coal for household consumption did not decline to any such level. This resulted naturally from the greater economic influence of the large industrial consumers of coal who usually contract for their supply of coal for a year in advance, and whose individual coal consumption is very large by comparison with the quantity purchased in the course of a year by the average retail coal dealer. It was not at all uncommon for industrial coal to sell f. o. b. the mine at price $2.00 and more per ton below the f. o. b. mine price for household fuel. In the absence of a regulated price it is inevitable that the price of industrial fuel is subjected to the greatest pressure, with the result that the producer must recoup himself as best he can by securing a disproportionately high price for household fuel.

In 1923 the total number of operating mines in the country was 9331. In 1933 the number of operating mines had been reduced to 5555. The capacity of the mines producing in 1923 was 970,000,000 net tons, the capacity of the producing mines in 1933 was 615,000,000 tons. Thus 3,776 mines with a production capacity of 355,000,000 net tons have been wiped out of the picture, with the resulting loss of millions of dollars in capital investment in these mines and also with probable permanent loss of hundreds of millions of tons of coal which has become inaccessible except at a very high cost, because of caved workings, squeezes, etc. In addition to wiping out completely the operators I have just referred

to, the competitive conditions existing in the industry caused by this overcapacity have resulted in the insolvency or bankruptcy of many producing companies, including such large and powerful organizations as the Consolidation Coal Company and the Elkhorn Fuel Corporation, and has put the vast majority of producers on the road to insolvency. Since labor costs are the largest element of the total cost (60 to 65 percent) and since the other items of cost (taxes, insurance, workmen's compensation, supplies, power, depreciation, depletion) are quite inflexible, reductions in cost are naturally brought about by reduction in wages.

Prior to April 1, 1924, the Jacksonville wage agreement was consummated on the basis of $7.50 per day wage rate, which was merely a continuance of the agreement effective August 16, 1920. Immediately thereafter the non-union fields reduced their wages to the so-called Garfield scale of $5.00 per day base rate. The Jacksonville agreement effective April 1, 1924, continued until March 31, 1927. This wide disparity in the wage scale resulted in a series of strikes in the northern states beginning in 1925 and terminating in the early part of 1928. During this period the Union was practically wiped out in Pennsylvania, Ohio and portions of Indiana. In Pennsylvania and Ohio the first reduction in wages, made in an effort to meet the competition from the southern fields, was to reduce the $7.50 rate to $6.00 and other rates proportionately. This continued until June 16th, 1929, when another reduction of $1.00 per day and other rates proportionately was made at the northern mines, bringing the wage scale to $5.00 per day, which was relatively the same level as that which obtained in the low volatile fields of the South. From 1929 to the end of 1930 the wage scales, North and South, remained relatively uniform. Following 1930 and with the accentuation of the depression, there was a continuous downward spiral of prices and wages. On November 16, 1931 wages were reduced in my district to $4.40 per day and other rates proportionately. Again on April 16, 1932, wages were reduced from $4.40 to $4.00 per day, and again December 16, 1932, wages were reduced to $3.44 per day. This schedule of wages remained in effect quite generally in the Central Pennsylvania District until July 16, 1933, when wages were increased prior to the enactment of the Bituminous Coal Code on October 2, 1933, and the establishment of the union in the Appalachian area under the Appalachian Wage Agreement as of the same date.

Charles O'Neill

The downward spiral of prices and wages can best be shown by the effect of one upon the other. On November 16, 1931, a wage reduction from $5.00 to $4.40 per day was made in anticipation of the contracting season which would begin about January 1, 1932. Bids for business were made generally on this reduced wage scale. One very large buyer in New York City, the Interboro Rapid Transit Company, made its lettings after a public opening of bids. The public opening of bids in 1932 was about the 15th of March and their awards or lettings were granted on March 29 of that year. One of the larger suppliers of the Interboro Rapid Transit Company submitted a very low price and received a generous proportion of the business. The day following the making of the awards, namely, March 30, this supplier cut his wages.

Of course, other shippers had to revise their bids in order to participate in this business [illegible] the result that a further reduction in wages to the basis of $4.00 per day was made on April 16, 1932, generally throughout the district because of the price cut "discounted" in the bid of this one particular shipper.

Before the contracting season of the next year, 1933, the final wage reduction was made to $3.44 per day.

On the opening of bids to the Interboro Rapid Transit Company about March 15, 1933, it was discovered that one of the largest shippers had resorted to a very low price, in fact, $1.03 per ton run-of-mine for high grade low volatile coal, which was the lowest price ever quoted at this plant for coal in the recollection of any one. Naturally this price on the great volume of business involved had the effect of disturbing the prices for public utility business at every plant along the Atlantic seaboard, and its effect reached to points far in the interior.

From 1898 until March 31, 1927 relations in the union fields were maintained and wages were established for that entire period by negotiations directly or through Federal intervention by the Central Competitive Field Wage Conference. The Central Competitive Wage Agreement was a basic agreement for the union fields of the country and was made by the district comprising Ohio, Indiana, Illinois and Western Pennsylvania. This interstate agreement was called the basis agreement and the increases or decreases in wages allowed upon basic rates by this agreement affected the same basic rates in all of the so-called outlying Union districts that were not part of the Central Competitive Field.

In 1906, 1910 and 1914, the Central Competitive Field failed to make an agreement and in these years agreements were made by signing up with individual districts and mines. However, the United Mine Workers of America established with its original agreement the changes that were to be made in basic rates, and the effect was working out an agreement substantially in accord with the custom under the interstate agreement.

By the end of 1927 practically all of the union fields except Illinois and Indiana had changed to non-union bases of operation. During this period prices and wages continued downward until they had reached their lowest point in May 1933, just preceding the enactment of the National Industrial Recovery Law. Under the guidance of the National Recovery Administration a Code of Fair Competition was established, and complementary to it the Appalachian Wage Agreement was established by collective bargaining under the provisions of 7a and section 7b of that Act. This agreement was an interstate agreement, taking in all of the mines in Pennsylvania, Maryland, Ohio, W. Va., Virginia, eastern Kentucky, and northeastern Tennessee, and involved approximately 300,000 men and a production of 250,000,000 tons in 1934. There was a small number of company unions in this area which did not sign the Appalachian Agreement, and a number of companies in Harlan County, Kentucky, that remained non-union. The total production of these out of the 250,000,000 tons was approximately 15,000,000 tons and involved probably 20,000 men.

The necessity for an interstate agreement is obvious. All of these districts in the Appalachian area compete with each other, both with mines in their own district and with all of the other districts making up this great interstate area. They also compete with Illinois and Indiana intensely, and the wage scales in Illinois and Indiana are now predicated upon the wage scale negotiated by the Appalachian Joint Wage Conferences. The operators in one district are unwilling to negotiate an agreement under ordinary circumstances separately, but with such a volume of tonnage in a conference that the basic rates of pay for day and piece workers over a large area will be relatively uniform. The Appalachian Conference governs the direct establishment of basic rates of pay on about 70% of the production in the United States. The establishment of the basic inside day wage rate and the basic Shortwall machine cutting and loading rate in all fields in this basic agreement provides the

bases necessary to project all other rates in every given mine in the area. With an agreement as to these basic rates, every operator knows approximately his competitive situation so far as wages cost is concerned with all of his competitors. Basic rates of pay in other Union districts vary as basic rates in Appalachian Area are raised or lowered.

It would be impractical for any one district to engage in establishing an agreement alone, because of its fear that other districts might compel a settlement of their wages upon a basis more favorable to them than such one district would be able to negotiate alone. Therefore, the interstate contracts made by the old Central Competitive field and the one now made by the Appalachian Joint Wage Conference affect a sufficient volume of competitive tonnage as to establish fairly relative wages cost in the districts directly affected and to have a compelling influence upon the negotiations and settlement of wage agreements in the outlying districts upon the same basis. In other words, with 70% of the tonnage of the United States agreed upon a basis of settlment in the Appalachian Conference and with these mines operating upon that basis, there is little likelihood that Illinois and Indiana could afford to refrain from signing a similar agreement, because the Appalachian mines would be able to supply, with the excess productive capacity they have, all of the customers of the operators in Illinois and Indiana. Therefore, it may be said without any doubt that wage-making under union conditions in the mines of the United States must necessarily be interstate in character, and there is a continuous history of this kind, broken only in a few periods, of agreements on this basis.

During the period of non-union conditions prevailing in the Appalachian area there was no way of establishing uniform or relative wage scales, and the force of competition compelled a continuous descent of wage rates and earnings from 1928 to 1933. Since 1933 the Appalachian Joint Wage Agreements have stabilized conditions as to wages and hours of labor in practically every district in the United States. True, there are several local strikes in northeastern Tennessee and Alabama at the present time, based upon the competitive circumstances in those fields where the operators in the case of Alabama believe that the wage scale negotiated by the Appalachian conference and applied to their rates will so intensify their competition with oil and natural gas as to practically destroy their business, and in the case of northeastern Tennessee a fear that if Alabama is successful in maintain-

ing wage rates below those established by the Appalachian Conference and they (Tennessee Operators) are compelled to support the results of the Appalachian conference that Alabama competitors will destroy their business. This only another showing of the direct effect wage relationships have over wide areas in different districts and in different states.

Among the matters to be settled in the recent Appalachian Wage Conference was the question of wage differentials. The United Mine Workers requested a settlement of differentials within and between districts, based upon facts and equity. This demand was made when the Conference was assembled February 18, 1935. The operators agreed to undertake a settlement of the problem surrounding these questions. Wage differentials is simply another way of saying wage relationships. The importance competitively of proper wage relationship is manifest when it is remembered that sixty to sixty-five percent of production cost is wages cost. The mine workers were willing to adopt any of a dozen formulas which were submitted that would bring about a solution of the North-South differential, which is 40c a day less for day labor in the South than in the North, the intra-district differentials, which include the relationship of rates between mines within the same district, and the inter-district differentials which includes the relationship of basic day and tonnage rates between different and competing districts. The simple fact is that the Appalachian Wage Conference of 1935 made no progress whatever, because of the tenacity with which operators who had advantageous or lower rates than their competitors, refused to agree upon any formula that would bring about a settlement of the questions. Of course, those districts which believed they had higher rates and were being prejudiced by the rates in other and competing districts were just as firm that a formula should be agreed upon that would bring a settlement. So serious was the division of opinion between the operators on these differential questions that it almost broke up the Wage Conference. Finally in desperation the mine workers and those operators who wished to bring about a settlment of the wage scale finally agreed upon the present clause in the Appalachian agreement, which is not one having determinative provisions in it. These wage relationships become of paramount importance because of the effect they have upon the competitive situation as between shippers who may be preferred and those who may be prejudiced by the rates in effect. This is one of the most difficult

questions in any wage conference and is to a large extent interstate in character.

Since 1919 the experience of the industry with reference to labor disputes has been as follows:

At the September, 1919, Convention of the United Mine Workers of America a demand was made for a thirty-hour week, 60% wage increase, six hours per day, five days per week, as against the then prevailing wage scale on an eight hour day, six days a week. This offer was rejected by the coal operators and a strike was called by the United Mine Workers of America, effective November 1, 1919, and which lasted to December 10, 1919. Seventy per cent of the miners went on strike in some States. During the period of this strike the limited storage supplies fo the country were used, and winter was upon us. Schools and hospitals in different parts of the country, and particularly in those portions of the country far away from the mines in states that did not produce coal, were without fuel, and indications were that the situation in this respect, as well as in respect to public utilities and railroads, would become serious each day the strike continued.

The result was that the President of the United States intervened through cabinet officers and directly by bringing about a temporary settlement and appointing a Coal Commission to conduct extensive hearings as to the causes of the strike, the demands of the mine workers, and the defense offered by the operators of the nation. This Commission made an award, which was effective April 1, 1920. The mine workers were awarded an increase of an average of about 27%. I was technical adviser to one of the Commission and was quite familiar with the work of this Commission and the negotiations attendant thereon.

The effect of the strike, however, was to reduce the supply of coal available and sky-rocket prices in the non-union operations of the country so greatly that the President re-established the United States Fuel Administration and re-established the maximum prices which had been in effect up to February 1, 1919, for the period from about December 1, 1919, until April 1, 1920, when under the recommendation of the Commission these maximum prices were again abandoned, when their award to the mine workers became effective.

The post-War boom was beginning about this time, and in addition to the development of the inflationary booms in Europe, a serious shortage of transportation facilities developed in the United States, commonly

known as coal car shortage at the mines. With the increasing shortage of cars and the resulting dimunition of the coal supply, prices began to climb very rapidly after April 1, 1920, and by July 15, current prices for bituminous coal reached the unheard of heights of fifteen to twenty dollars a ton in certain cases. Current prices continued at very high levels until about December 31, 1920.

During this period the award made by the Bituminous Coal Commission to the day wage workers for an increase of one dollar per day (making their daily wage six dollars for eight hours), was subjected to violent criticism in certain coal fields, particularly Illinois and Indiana, which was followed by a series of wild-cat strikes in those states. President Wilson permitted and requested re-assembling of the Central Competitive Joint Field Conferences for consideration of the situation. This conference was assembled and failed to reach an agreement or settle the difficulties, which were expanding in Illinois, Indiana and other coal fields by this time, whereupon the Illinois operators agreed with the Illinois miners to increase the daily wage by $1.50, effective August 16, 1920, making the basic inside day wage rate for eight hours $7.50. This was followed by the signing of agreements in all union districts, applying the $1.50 increase to the daily wage rates. The first award was negotiated by the Central Competitive Field Conference, which comprised Illinois, Indiana, Ohio, and Western Pennsylvania.

In 1921 there was a very substantial decline in prices, with the result that the operators asked for reconsideration of the wage agreement and a conference was called in the early part of 1922. Operators from certain districts refused to attend the conference, with the result that a strike was called April 1, 1922. The strike was very extensive, and was terminated in different fields at different dates between August 19 and the end of the year. In that case local wage agreements only were signed, but President Harding intervened on numerous occasions and was instrumental in bringing about conferences between the miners and operators that finally resulted in a settlement. At the same time while the strike was in force it was one hundred per cent effective in six fields and in as many states, and between 75% and 100% effective in thirteen other districts out of a total 42. At its maximum it was 73% effective for the country as a whole.

Charles O'Neill

During the 1922 strike there was some non-union operators in Pennsylvania and some union operations in West Virginia. Practically the entire North was unionized, and the South non-union.

The effects of the 1922 strike in the coal mines was aggravated by the railroad shopmen's strike which began July 1, 1922, which increased the "bad order" of railroad equipment tremendously and brought about one of the worst transportation deficiencies or coal car shortages which we have ever experienced, in the latter part of 1922. This car shortage continued throughout the latter part of 1922 and the first quarter of 1923. As a result prices were again very high during the latter part of 1922 and the contracting period of 1923. In other words, most of the coal contracts are made in the period from January 1 to March 31 of each year, and generally effective April 1 and continuous for a one-year or two-year period.

Prior to April 1, 1924, the Jacksonville Wage Agreement was consummated on $7.50 basis, which was merely a continuance of the Agreement effective August 16, 1920, and immediately thereafter the non-union fields reduced their wages to the Garfield Scale of $5.00 base. The Jacksonville Agreement effective April 1, 1924, continued unfil March 31, 1927. The wide disparity in the wage scale as between Illinois, Indiana, Ohio and Pennsylvania on the one hand and the lower rates generally effective in the States of Kentucky and West Virginia forced operators in the Northern states to break away from the union and reduce the wages of their miners. This brought about a series of strikes in the Northern states, beginning in 1925 and continuing until the early part of 1928. During this period the Union was practically wiped out in Pennsylvania and Ohio and portions of Indiana. Following this, a series of price and wage cutting commenced. As a result of this continuous wage-cutting and price-cutting, bankruptcies had increased, mines were being abandoned in all portions of our district, and conditions among the mine workers had become so deplorable that the men began to organize themselves in the United Mine Workers of America. The operators had reached the point where conditions were so bad that no resistance was made to the organization of the union. When the miners were organized they first demanded checkweighmen and recognition of the mine committees. This request was readily acceded to by the operators in the Central Pennsylvania District.

These events were occurring in May and June, 1933,

and during the period when the National Industrial Recovery Act was being considered and finally passed by the Congress. When the National Industrial Recovery Act became a law and its Administrator appointed, operators from all over the United States were called to Washington to work together with the N. R. A. and the Mine Workers in formulating a Code of Fair Competition and the First Appalachian Wage Agreement, which Wage Agreement became operative on the same date as the Code of Fair Competition, namely October 2, 1933. The Agreement and the Code were worked out simultaneously, and one document was contingent upon the other. The Appalachian Wage Agreement covers several thousand mines in Pennsylvania, Ohio, Maryland, West Virginia, Virginia, Eastern Kentucky, and Northern Tennessee, producing in 1934, 251,000,000 tons and employing 310,000 men. The original Appalachian Wage Agreement extended to April 1, 1935. Failure to negotiate a new Agreement prior to that date resulted in threat of a general strike, which was postponed from time to time on five different occasions through the intervention of the Federal Government, and the settlement which was finally achieved was assisted through the intervention of the United States Department of Labor.

The effect of large strikes upon the distribution of coal has been as follows:

These strikes caused gains of production in the non-union areas, and to some extent were responsible for permanent losses of tonnage in the union areas, therefore these strikes affected different areas in a different way. Since strikes were more effective in some areas than others, the result was a permanent shifting of production from the more seriously affected fields to those relatively unaffacted.

The effect is clearly brought out by an analysis of the records of strikes 1919, 1922, 1927 and 1932, upon different producing areas. In 1918 the four highly organized states of Illinois, Indiana, Ohio and Pennsylvania, produced nearly 345,000,000 tons of coal, while the two relatively unorganized states of Kentucky and West Virginia produced 121,500,000 tons. Of the total production of the six states, there was produced by Northern states 73.9%. In 1919 there was a six-week strike in the union fields. At that time there was some union operators in the fields in Kentucky and West Virginia and some non-union operation in Western Pennsylvania, but the effect of the strike was the loss of 30 days per man employed in the Northern states and 13 days per man in the Southern

states. As a result of that short strike the percentage of the combined output produced by the Northern states declined to 71 and the 1918 percentage was never again recovered. Similarly, in 1921, the year before the big strike of 1922, the four union states produced 69.5% of the combined output and the non-union states 30.5%. The loss of operating time in 1922 because of the strike amounted to 105.7 days per man employed in the Northern states, whereas in the two Southern states the loss was only 35.9 days per man employed. The result was seen in the percentage of coal coming out of the Northern states declining from 69.5 to less than 64 and again the Northern states never recovered their 1921 percentage. In 1926 the Northern states produced approximately 57% of the combined output and the Southern states 43%. During the strikes of 1927 the North lost 84.5 days per man employed, while the South lost less than half a day per man employed. The output of the North declined to slightly more than 50% of the combined output, and again we find that it never recovered its 1926 percentage. In 1931 the Northern states produced 55.5% of the combined output. During 1932 the Northern states lost 38.4 days per man employed because of strikes, while the southern states lost only .6 of one day. Again the Northern states dropped, this time to 52.8, and again it never came back to 1931 percentage.

The shifting of production from one area to another not only affects the fortunes of the individual operators, but has serious social consequences in the territory adversely affected, which means loss of capital to investors in abandoned coal mining properties, loss of employment for labor, and the loss to society of the coal left in the ground in the abandoned mine, most of which will never be recovered. In the territory which is adversely affected by the shifting of production there are also great indirect losses to local businesses and local industries, financial institutions and railway carriers, all of which naturally developed with the growth of the coal mining industry within the district and all of which suffer a loss of business and of income as a result of the diminished activity of the local mining industry.

Consumers also have a tendency to prefer a continuous assured source of supply, and non-union supply was not threatened by strikes to the same degree that union supplies were threatened. This caused customers who shifted during the emergency from union operations to non-union operations to continue to give their business to the more assured supplier.

Charles O'Neill

Many efforts have been made in recent years to control the competitive condition in the industry.

During the latter part of 1931 there was a great deal of discussion among coal operators and State and National officials with reference to the desperate conditions in the coal industry. In the summer of that year Secretary of Commerce Lamont and Secretary of Labor Doake of President Hoover's cabinet had a meeting of operators in Washington, D. C. They discussed with the coal operators the necessity of taking some action to improve the condition of the industry. After considerable discussion it was the views of the Secretaries of Commerce and Labor that there was nothing they could do to assist in the situation, except to recommend to the producers that they endeavor actively to work out their own problems. Following this, the Governors of various States discussed the matter with coal producers in their respective States and Governor Sampson of Kentucky had several meetings with operators of Kentucky and operators from adjoining and competing states.

In October, 1931, Governor Conley of West Virginia called a meeting of coal operators at Charleston, West Virginia, for the purpose of discussing the situation in the coal industry in West Virginia, and also the advisability of his participating in conferences with the Governors of the important coal-producing states east of the Mississippi River, to see if anything could be worked out within the states to improve conditions in the coal mining industry. At the conclusion of that meeting it was the view of those present, including Governor Conley, that the matter was one that would have to be handled by the producers themselves. There was discussion of limitation of production in the states by agreement, and of the question of the states themselves entering into an agreement for uniform legislation to limit the production of coal. It was generally agreed that this was impracticable, if not illegal. A committee of operators was appointed at that meeting who arranged with Mr. C. E. Bockus, President of the National Coal Association, to call a general meeting of coal producers east of the Mississippi River, in which territory is produced about 90% of the National bituminous coal output. The meeting was held in New York City on October 21, 1931, and a number of plans were there discussed looking toward the stabilization of the industry. As a result of that meeting, and subsequent meetings, it was decided to attempt the organization of so-called District

Sales Agencies. One of the first of these sales organizations was Appalachian Coals, Inc., which was organized by a group of producers in the Southern high-volatile coal fields. After the organization of Appalachian Coals, Inc., and before it had opportunity to function, an injunction suit was brought against it by the U. S. Attorney General on the ground that the organization was in violation of the Sherman Anti-Trust Act. The trial court sustained the Government's contention, but this decision was reversed by the United States Supreme Court in March, 1933, and thereafter Appalachian Coals, Inc., was actively organized to do business and continued to function until some time during the winter of 1933-1934. The inherent weakness in a district coal sales agency is that it involves the production of coal in only a limited area and in the nature of the case cannot affect or stabilize competition between it and producers in other competing coal fields. It has been aptly said that if district coal selling agencies were generally organized, and in the absence of their regulation by Government, the industry would then be organized for warfare between large armies under expert leadership, and that the resulting battles would be ever more bloody and destructive than the guerilla warfare which has prevailed in the industry during the past twelve years.

When the National Industrial Recovery Act became a law in the summer of 1933 and a Recovery Administrator was appointed coal operators from all over the United States were called to Washington to work together with the National Recovery Administration and the United Mine workers in formulating a Code of Fair Competition and a wage agreement. The Coal Code and the first Appalachian Wage Agreement both became operative on the same day, namely, October 2nd, 1933.

The N. R. A. had a most beneficial effect on the industry. It increased and stabilized the price of coal; it increased and stabilized wages; it made it possible for the industry as a whole to earn a small profit in the year 1934, the first in ten years. When Congress had under consideration the extension of the National Industrial Recovery Act for a period of two years, the proposal had practically unanimous support and approval of the Bituminous coal mining industry. Under the N. R. A. Coal Code there was a great contraction in the difference between the price of coal sold to industrial consumers and the price of coal sold to retail coal dealers for consumption by householders. Prior to

the N. R. A. Coal Code it was not uncommon that the price of industrial coal F. O. F. the mines was $2.00 and more per ton below the price for household fuel. Under the N. R. A. Coal Code this price differential did not average more than 75c a ton. During the existence of the N. R. A. Coal Code, an agreement was made between the subdivisions of Division No. 1 (comprising practically the entire Appalachian area) under which prices were to be so coordinated that each of the subdivisions would receive approximately a certain predetermined percentage of the aggregate volume of production within that area. This plan was in effect from June, 1934, until May, 1935, and was worked out with remarkable accuracy. Each of the affected subdivisions had an output approximately equal to the percentage agreed upon, although naturally there were some slight variations from the exact figures. Since the termination of the N. R. A. on May 27th of this year, although mine wages have held up and were actually increased effective October 1st, 1935, prices have greatly declined, so that losses from current sales are now greater than during the depths of the depression in 1932 and 1933.

There is no difference between coal mined in one state and coal mined in another state, so far as competition at any particular destination is concerned, if the coal is delivered at the same price and is of the same quality. From the standpoint of competition there is no separation or distinction as between coal produced within the state of consumption and coal shipped to such state from fields in other states. The consumer has no interest in the fact as to whether the coal which he consumes is produced in Pennsylvania or is shipped into Pennsylvania from West Virginia. He is interested only in price and value. This is demonstrated by the large amount of coal shipped from other states that is consumed in the large producing states of Pennsylvania, Ohio, Indiana and Illinois, as compared with the coal mined in those states and consumed in the home state.

An example of this is the fact that rates on Bituminous coal, established by State commissions, are changed by the Interstate Commerce Commission if they tend to give coal on the State rates preference over coal moved on the intrastate rates. Numerous rates of this character are established. The fact is that practically all Bituminous coal rates are subject to regulation by the Interstate Commerce Commission in order to maintain fair competition by the railroads moving coal into consuming points. The same situation, as

exists competitively between railroads for the transportation of Bituminous coal, exists among the producers of Bituminous coal, who seek to sell coal at a given destination. If intrastate prices can be maintained on a lower basis than interstate prices, it would eliminate interstate coals from competition, the same as if an interstate freight rate were substantially higher at a given destination than the intrastate freight rate. If the coal is put out of line on the basis of delivered cost with a competing coal, it will, of course, lose the market, in fact will not have any opportunity to participate in the market.

Theoretically, an industry will adjust itself through the operation of supply and demand, by the speedy elimination of the most inefficient producers, who are unable to compete. But in the coal mining industry, this does not happen because of the great resistance on the part of even the least efficient producers to closing down their mines. A coal mine represents a large investment, averaging between $3.00 and $4.00 per ton of annual developed capacity. The cost of maintaining a mine which is closed down is prohibitive, ranging from 15c to 25c a ton of annual capacity, so that the unfortunate owner is better off to operate his mine at an actual *cash* loss at 15c to 20c a ton. The operator is practically forced to continue to operate his mine until his working capital has been entirely wiped out by losses, since his only alternative is to abandon his property and once and for all time sustain the loss of his entire investment. If the industry is not regulated through price control, and the resulting stabilization of wages, as contemplated under the Bituminous Coal Act of 1935, there will inevitably follow the destructive price-cutting and intolerable wage-cutting, as in the past. If carried on to its final and logical conclusion, the result would be that a very large majority of the operators in the industry would be eventually bankrupted and only the strongest units would survive and ultimately be in control of the industry. However, this liquidation would extend over many years, would result in the ruin of entire communities that would succumb in the struggle, and would pauperize coal mine labor during the entire period of the conflict. That this experience would continue over a long period of time is apparent from the fact that the industry went through a ten-year period of extensive liquidation from 1923 to 1933, and at the end of the ten years it was more demoralized than at any time during the period. Eventual stability under unregulated com-

petition would be achieved, but at a prohibitive cost of human misery and destruction of property.

As an alternative, it is essential that some bottom be established, beneath which the price of coal cannot fall, in order that the efficient operating units in the industry, ready to supply the public at all times with coal at a fair price, while paying coal mine labor fair wages, may be kept in operation. The price-fixing provisions of the Bituminous Coal Act of 1935 provide this solution.

The testimony of H. L. FINDLAY, admitted in evidence under the stipulation is as follows:

I am vice-president of the Youghiogheny and Ohio Coal Company which owns and operates mines in Western Pennsylvania, Ohio, and Southern West Virginia, and which owns and operates docks on Lake Superior and Lake Michigan and at Bridgeport, Connecticut. I am also president of the Simpson Creek Collieries Company of Cleveland, Ohio, with operations in Northern West Virginia. I have been in the coal business over 30 years and have been vice-president of the Youghiogheny and Ohio Coal Company since 1915.

Our companies distribute coal from tidewater through New England, from our docks into Wisconsin, Minnesota, North and South Dakota, and Idaho, and by rail into New York, Pennsylvania, Ohio, Michigan, and Indiana.

Most of the coals in the Appalachian area are interchangeable as to use; that is, most of them can be used for steam or domestic and general purpose coals. Even the special purpose coals, such as high grade gas coal or by-product coal, while they are required for certain uses can also be used for steam or domestic purposes. In effect, therefore, any of the Appalachian coals are in competition with all other coals in all markets east of the Mississippi River. On the Great Lakes there is a volume of business amounting to about 35,000,000 tons a year, for which practically all the mining districts in the Appalachian area compete.

Prior to 1924, the districts in which we operate, particularly Western Pennsylvania and Ohio, were able to fairly well meet their competition from the unorganized fields because up to that time, for the most part, the wage scales, taking into consideration the various conditions in the various fields, were relatively in balance, so that we were able to compete on a reasonably fair basis.

However, starting with April 1, 1924, when the Jacksonville Wage Agreement went into effect, and which applied only to the organized coal fields, the unorganized fields immediately commenced to reduce their wages, and the competition from the unorganized fields became more intense from year to year and resulted in the diversion of very large tonnages from the organized fields to the unorganized.

This condition made the competitive condition even more severe because of the fact that as a mine loses tonnage and has less operating time, its cost correspondingly increases, while the mines that can secure the business and better operating time correspondingly reduce their costs. Therefore, as the tonnages shifted from the organized to the unorganized fields, the ability to compete on the part of the organized fields became more difficult from year to year. To illustrate what I mean, in Western Pennsylvania our tonnage was approximately half, in 1924, what it was in 1923. It continued about on that basis until the expiration of the Jacksonville Wage Agreement, March 31, 1927, at which time our mines were put on an open shop basis. Immediately, upon doing that, we commenced to get our tonnage back, and, by 1928, produced approximately the same tonnage in Western Pennsylvania that we did in 1923.

The progressive decline in price could only be met by cutting wages because wages are the only cost element subject to appreciable reduction. Labor costs approximate 60% to 65% of the total cost of production and the balance of the cost item consists of such factors as taxes, workmen's compensation, depletion, royalties, material and supplies, the cost of which a producer cannot control. The result is that when he gets into a fierce competitive situation the only thing he can do is reduce his wages.

The consumer is interested in the price at which the coal is delivered to his plant or to his home. The two main factors which make up the delivered price are the price at the mines and the transportation charges. If there is a reduction in either one of these items it will result in diversion of tonnage from one producing area to another as in most cases a difference of a few cents a ton will result in a consumer shifting his source of supply. Since the freight rate is fixed the only part of the delivered price which is subject to competition is the mine price, and the only part of the mine price which

can be controlled by the individual producer is the labor cost.

In order to meet the competition referred to, we reduced our minimum inside day wage in 1928 from $7.50 to $5.00 per day and the loading and cutting rates were reduced relatively the same amount. We started out on this $5.00 basis when we went open shop, and that continued until about the spring of 1929, when, due to competition not only from the non-union mines in the South but also from mines in the same and neighboring districts that had also gone open shop, it got to a point at which individual companies, in order to secure a piece of business would take that business below cost and then go back home and reduce their wages to a point which would enable them to at least get their cost out of that business. This condition resulted in chaos for the reason that you never could tell what your neighbors were paying their labor, and when you bid on a piece of business, you could not tell whether you would be within 5c or 50c per ton of the price that would take that business. As a result of these conditions and the more intense competition which developed after the depression started, the cutting of wages reached a point where, in many of the mines in Western Pennsylvania and Ohio, the rates got down as low as from $2.00 to $3.00 per day. Our company was obliged, on account of these conditions, to make at least six successive wage cuts.

This condition continued until, in 1932, there were numerous strikes in Western Pennsylvania and Ohio on the part of the open shop miners to try and force an increased wage on which they could live. In considering this matter, you must also take into consideration the fact that the miners did not work every day but did not average, in our district, in excess of three days per week, which would mean that with the low wages prevailing in 1932 and the early part of 1933, a miner would not earn more than $6.00 to $8.00 per week, on which to support himself and his family.

This condition continued until the inception of the Bituminous Coal Code on October 2, 1933, at which time practically all the mines in the Appalachian area became unionized and the wages were advanced to a point where the miner has some chance of making a fair and decent living.

In spite of the continued wage cuts, our company and the other companies operating in the same area were not able to operate their mines at a profit. In fact, the

industry as a whole operated in red from 1924 until the inception of the Bituminous Coal Code on October 2, 1933.

Commencing with the inception of the Bituminous Coal Code, our company and the other companies operating in the same area were able to pay their labor a fair wage and also obtain a profit on their coal. That condition continued until the Schechter case decision. The wages under the Code carried through until October 1, 1935. The prices under the Bituminous Coal Code were maintained fairly well for about one year. It then became evident that there was to be no effective enforcement of prices, and many companies sold coal below Code prices in their effort to secure business and operate their mines to the fullest extent possible. This became progressively worse, and by the spring of 1935 there was very little observance of the Code. This was due primarily to the lack of enforcement.

After the demise of the N. R. A., the coal industry went back to its old vicious practice of practically unlimited price-cutting. This has become progressively worse until, today, coal is being sold in many districts at prices from 25c to $1.00 per ton below actual cost.

The inevitable result if this condition continues is that it will be impossible for the industry to pay the present wages. The economic situation will force reduction of wages and will bring the industry back to the conditions that prevailed from 1927 until October 1933. These evil conditions will return irrespective of any improvement in general business conditions, as illustrated by the fact that in 1929, the year in which business generally was in a highly prosperous condition, the coal industry generally was greatly depressed.

In my judgment this downward trend cannot be stopped by any action by individual States because the pressure of competition from other States makes such action impossible. Nor can it be stopped by voluntary action, such as the formation of marketing agencies by Appalachian Coals, Inc. My company has been a member of Appalachian Coals until the recent months. Our experience has been that the districts outside of Appalachian Coals which fixed the lowest prices, really fixed the price for Appalachian Coals. Even if a similar organization existed in all of the major districts the situation could not be controlled any better within those districts than Appalachian Coals has within its own district.

H. L. Findlay George W. Reed

The pressure of the competitive situation results in uneconomic mining of coal. A good deal of coal is left in the ground which, under more favorable conditions, would be taken out. Such coal is permanently lost and can never be recovered. If the industry were to be stabilized producers would have an opportunity to mine the coal in a proper manner as they proceed into their workings and prevent this waste.

The most appropriate agency for initiating price fixing is a group representative of the producers in the district. These persons are most familiar with the situation in the district and with the competition which they have to meet. It would be impracticable, if not impossible, for a central governmental agency to initiate prices due to the great complexity of the situation. Coordination by a simple agency of these prices is necessary in order to stabilize competitive relationships between the districts and to maintain an equal opportunity to compete in economic markets.

The testimony of GEORGE W. REED, admitted in evidence under the stipulation is as follows:

I am a director and vice president of the Peabody Coal Company which is one of the largest coal producing companies in the United States and by itself and subsidiaries operates mines in Oklahoma, Illinois, Indiana, West Virginia and in Harlan County, Kentucky. The largest interests of the company are in Illinois. I have been connected with the coal business for 32 years and with the Peabody Coal Company for 19 years.

Generally speaking, very few of the coal producing companies in Illinois have been able to show any profit during the last eight years. The decline in production and profits began in 1923 and continued to 1933. The situation was at its worst just before the enactment of the National Industrial Recovery Act. The effect of the N. R. A. Code was to improve conditions materially in Illinois. During recent years the bulk of Illinois coal has been marketed in Illinois, Iowa and Missouri, and is shipped to some extent to 13 other states in direct competition with coal mined in 15 producing states. It meets coal from those states in the following consuming markets:

Alabama coal in Tennessee, Mississippi, Louisiana, Arkansas, and Missouri.

Tennessee coal in Indiana, Michigan, Illinois, Iowa, Wisconsin, Minnesota, North Dakota and South Dakota.

East Kentucky coal in Indiana, Michigan, Illinois, Missouri, Iowa, Nebraska, Wisconsin, Minnesota, North Dakota and South Dakota.

West Kentucky coal in Kentucky, Tennessee, Mississippi, Louisiana, Arkansas, Missouri, Nebraska, Iowa, Minnesota, North Dakota, South Dakota, Indiana, Michigan, Illinois and Wisconsin.

West Virginia coal in Indiana, Michigan, Illinois, Iowa, Missouri, Nebraska, Minnesota, North Dakota, South Dakota and Wisconsin.

Virginia coal in Indiana, Michigan, Illinois, Iowa, Missouri, Nebraska, Minnesota, North Dakota, South Dakota and Wisconsin.

Ohio coal in Michigan, Wisconsin, Minnesota, North Dakota, South Dakota and Indiana.

Western Pennsylvania coal in Wisconsin, Minnesota, North Dakota and South Dakota.

Indiana coal in Indiana, Michigan, Illinois, Iowa, Missouri, Nebraska, Wisconsin, Minnesota, South Dakota and North Dakota.

Iowa coal in Iowa, Missouri, Nebraska and Minnesota.

Missouri coal in Missouri, Illinois, Iowa, Nebraska, South Dakota and Kansas.

Kansas coal in Missouri, Iowa, Nebraska, Kansas and South Dakota.

Arkansas coal in Arkansas, Missouri, Iowa, Nebraska, Kansas, Minnesota and South Dakota.

Colorado coal in Nebraska, Kansas, Iowa and South Dakota.

Wyoming coal in Nebraska, Kansas, Iowa, North Dakota, South Dakota and Minnesota.

North Dakota coal in North Dakota, South Dakota and Minnesota.

Illinois coal is not in direct competition with that produced in Maryland, Central Pennsylvania, Michigan, Montana, Utah, New Mexico, Idaho and Washington, but coals with which Illinois does compete directly are in direct competition with coal from these producing States.

Illinois coal can be, and has been, used for every known purpose. Whether it is selected by buyers in 16 States to which it moves, depends entirely upon results obtained from its use, and the price at which it can be delivered to the consumer.

A coal operator will continue operating while losing money because there is always the hope of losing less by

operating than by closing. Operating some of the time tends to reduce the loss.

Conditions which are peculiar to the coal mining industry greatly increase and intensify competition in the sale of coal. Steady running time decreases the average production cost in a greater ratio than in almost every other industry. The difference in operating time between 2 days per week and 5 days per week results in a very great saving in the average production cost per ton. At our largest mines in Central Illinois producing 5,000 or more tons per day, the difference in cost between 8 days and 20 days per month running time is 30 cents per ton; at another group in the same locality, in mines producing about 2,000 tons per day, the reduction in cost is 41 cents per ton; and at a mine which we have been operating in Oklahoma, with a production of 600 tons per day, the difference is 70 cents per ton.

During the last 9 months of the year 1934, idle days at Peabody Coal Company's 12 Illinois mines which were in operation, not including those which did not operate, cost $607,574.87, exclusive of taxes, insurance, depreciation and the other fixed charges, which amounted to 13.6 cents per ton on their Illinois production of 4,461,000 tons during that period.

This large cost gives a tremendous incentive to the producer to move some of his production at almost any price. He may start selling his coal at a price based on four days a week production but encounter some difficulty in selling the last two days' production, and without regulation will make prices on those last two days of production on which no producer could exist and pay living wages.

A coal mine cannot be closed and left to take care of itself. There are two methods of handling a mine which is not in operation. One is to endeavor to keep water out of the mine, and a flow of air through it, which involves power costs and the expense of pumpmen, electricians and others, and the other method is to seal the mine and have temporarily only the expense of a watchman. The cost of placing a sealed mine in operating condition far exceeds the cost of maintaining it temporarily, and a mine is seldom sealed unless it is known when the mine is closed that it will be down for several years.

Another objection to the closing of a mine is the loss of experienced and trained men in the organization, such as superintendents, foremen, top and bottom bosses, who cannot be easily and readily replaced by another trained organization.

George W. Reed

Except during short periods of abnormal conditions, such as those created by labor troubles, railroad car shortages, war, the tendency of coal prices with unrestrained competition is always downward. Price reductions are never kept secret. Each price reduction is met by competing producers, and the tendency is towards a constantly reduced schedule of prices, and the field or producer quoting the lowest prices secures the market regardless of cost of product.

A price made on one car, or one ton of coal, quite often affects the prices on several hundred carloads. Prices made on such coal for delivery today will affect the prices on competing coals for delivery over several weeks.

The price on a ton of coal hauled from a local wagon mine into almost any community will affect the price which can be secured for coal which has moved interstate to dealers handling coal in the same community.

Price reductions intensify competition temporarily, but if continued may entirely eliminate competition. An outstanding example of this is the north half of the State of Minnesota and the east half of the State of Wisconsin. As a result of continuous price reductions on one hand and railroad rate increases on the other, those sections which formerly purchased large amounts of coal shipped all rail now rely almost entirely for their coal supply on the docks on Lake Michigan and Lake Superior.

Wages constitute 60% or more of the total cost of the production of coal. The costs of coal in the ground, machinery, equipment and supplies are fairly stable, and a producer has no control over the cost items of power, Workmen's Compensation, taxes, insurance, depreciation of plant and equipment, and depletion of coal acreage or royalty. The other cost items, except labor, are sales, administrative and general expenses. These latter items have all been cut to a minimum. The only item in which appreciable reduction in cost can be secured is that of labor, with the result that, without some stabilizing influence, coal is produced, sales are made and markets obtained through slashes in wage scales or lengthening of hours of employment, which produce low labor costs. With the necessity of meeting low prices, established as a result of low labor costs, competing producers are compelled to reduce their labor costs, and, in the absence of some restraining force, there is a constant lowering and further lowering of wages. These lower wage scales are sometimes reflected in hourly rates; at other times

by charges for house rents, household supplies, medical services, etc. The result is a constant lowering of wage cost to meet the constant lowering of sales realization. It is really a process of selling human lives and labor.

The one restraining influence against lowering of wages below that which will produce a fair scale of living, other than the desire of many operators to pay a fair living wage (which has, to a large extent, been ineffective due to the inexorable pressure of competition), has been unionization. Most strikes in the organized districts have been caused by attempts of producers to secure reductions in wage scales and the lengthening of hours to place them in position to meet prices made by operators in unorganized districts paying lower wages and working longer hours, or through resistance on the part of operators in organized districts to granting increases which would throw their wage scale and costs further out of line with those of competing operators. The last strike, in September of 1935, was caused by the producers' refusal to grant increases on account of the extremely low prices which have been made throughout the country since the abandonment of the Bituminous Coal Code under the N. R. A.

I know that in the latter part of 1932 and in the early part of 1933 in the Harlan County, Kentucky, field, wages were as low as $1.50 for a 13-hour day for outside labor, $2.00 for inside labor, and $2.25 for skilled labor. A subsidiary of the Peabody Coal Company, which operates two mines in Harlan County, was paying $4.00 for skilled inside labor, $3.50 for unskilled inside labor, $4.00 for skilled outside labor, and $2.50 for unskilled outside labor. We decided not to make any further reductions in the wages being paid by us, and, since by reason of the extremely low wages paid by other companies they were able to sell at much lower prices, we were forced to close one mine for the entire year of 1932 and the first seven months of 1933. Our company's losses in that period amounted to $333,000. The tonnage of these mines decreased from 1,125,000 in 1929 to $465,000 in 1932. All of the tonnage thus lost would have been sold in interstate commerce.

The testimony of FRED S. McCONNELL, admitted in evidence under the stipulation is as follows:

I have been in the coal business twenty-five years and I am now vice-president of the Enos Coal Mining Com-

pany, with mines located at Oakland City, Pike County, Indiana. Our production is about 900,000 tons per year.

Our coal is shipped into Indiana, the Chicago district, northern Illinois, eastern Iowa, Wisconsin, Michigan and Minnesota. Within the State of Indiana we meet competition from Illinois, West Virginia, eastern Kentucky, Ohio, Pennsylvania, western Kentucky, Iowa, Missouri and to some slight extent from Arkansas and Oklahoma.

All coal destined for railroad shipment is immediately loaded into railroad cars when it is produced. There can be no production unless railroad cars are available because there are no storage facilities at the mine. Substantially all of our coal is mined after we have received orders. This is generally true in Indiana and throughout the coal industry, as far as I know.

Aside from certain special purpose coals and the certain limited amount of coals used for domestic purposes, the bituminous coals from the various producing areas are of sufficiently similar characteristics as to permit their being used interchangeably, and the delivered price per heat unit contained in these coals is the determining factor of their use. This situation causes keen competition among coals from many producing areas in most consuming markets.

Owing to the pressure to sell coal and to keep his mines running, each operator, through his sales organizations, constantly is pressing his coal upon the purchaser. Steady running time at the minimum is a factor in lowering production costs. The operator therefore figures that he can take additional business at a lower price in order to give his mines steadier running and still be better off than he would be without the business. He therefore cuts the price and another operator, in order to hold the business, makes a still further cut in price. Inasmuch as wages are the largest single item of the cost of producing coal, the operator who takes business at a lower wrice immediately resorts to the cutting of wages as the most effective way of cutting his cost of production.

In areas where no collective bargaining agreements existed, it was the practice for operators, in their struggle to get business in order to keep their mines running, to cut the price below the cost of production. In order to obtain sufficient money to keep the mines in operation, they would offer their men a lower wage with the explanation that the business was made possible only by

price cutting and that unless the men accepted the lower wage there would be no work. The men, under the lash necessity, accepted the cut. Soon another operator in the same district or elsewhere would make another and greater cut in prices and repeat the same process with his men. This practice of wage cutting worked in a vicious circle, and resulted in the men accepting wages which were below the subsistence level and in many operators becoming bankrupt. This wage cutting did not work so disastrously in districts under collective bargaining agreements, but the cutting of wages in the non-union districts resulted in the latter districts securing a larger and larger proportion of the business. Thus, Indiana remained unionized to a great extent from 1923 through 1933. In consequence of wage cutting in the non-union districts which competed with it, the tonnage produced by Indiana fell from over 26,000,000 tons in 1923 to 16,379,000 tons in 1928. During that same period the tonnage of the State of Kentucky rose from somewhat over 44,000,000 in 1923 to over 61,000,000 in 1928. The chief cause for the decline in the production of Indiana during this period was the competition of the non-union areas.

In the past there has been a general disinclination on the part of most operators to accept unionization of their mines. In large part, this has been due to the competition with non-union mines which were able to reduce their wages and change their working conditions when it seemed necessary. It is very difficult to maintain a union in one state when a state which is competing in the same consuming markets is running non-union. Likewise, it is difficult for a district within a state to remain union when a competing district is non-union. The result has been that the number of non-union districts steadily increases, as well as the number of non-union states, as long as part of the industry is unionized and part is not unionized.

To give one specific illustration: Our company used to have a very considerable business in the City of Evansville, Indiana. Owing to the fact that many of the mines in the immediate vicinity of Evansville broke away from the union and operated non-union at a lower price and owing to the fact that western Kentucky has been paying a lower wage rate than the union rate of Indiana, we have lost entirely the business that we had in Evansville. The coal which we sold in Evansville we now have to seek other markets for, largely outside the State of Indiana.

Fred S. McConnell Phillip Murray

The competitive price and wage cutting which went on in the years following the World War drove the industry further and further into a state of demoralization. With the adoption of the Bituminous Coal Code under the National Industrial Recovery Act, conditions became stabilized for the first time in many years, and many companies in Indiana were able to earn a profit. The experience under the N. R. A. Code is a convincing demonstration that the conditions in the industry can be improved if competition is regulated. Since the end of the N. R. A., there has been a constant reduction in price and cut-throat competition has reasserted itself. In Indiana a reduction in price of at least 35c per ton has resulted.

It would be impossible to regulate interstate prices of coal without at the same time regulating intrastate prices. Under open competition there can be no such thing as an interstate and an intrastate price in the coal industry. If intrastate prices were lowered, they would immediately bring down the interstate price. This can be illustrated as follows: Operator A, mining coal in Indiana, may quote a low price to Consumer B, operating a factory in the State of Indiana, in an endeavor to take this coal business away from Operator C, mining and producing coal in western Kentucky and shipping to Consumer B in Indiana. Immediately, in order to hold the business, Operator C in Kentucky will reduce his price. It is therefore obvious that the Indiana coal operator cannot reduce his price to intrastate business without an immediate and disastrous effect upon the interstate business of the western Kentucky operator.

The testimony of PHILLIP MURRAY, admitted in evidence under the stipulation is as follows:

I started working in the coal mines when I was ten years old in 1897. I have been connected with the coal business ever since, either as a miner or as an officer of the United Mine Workers of America. I have been an officer of the United Mine Workers since January, 1913, and at present am International Vice President of the Organization.

When I became an officer of the United Mine Workers of America in 1913, collective bargaining in the coal mining industry was based upon an interstate relationship that existed between the producing states of Illinois, Indiana, Ohio and Western Pennsylvania, this field being

known as the Central Competitive Field. The territory embraced some 200,000 coal miners. Wages arrived at as a result of collective bargaining in the Central Competitive Field were used as a basis for mining wage contracts in all other unionized mine districts throughout the United States. In other words, they were used as a guide toward the determination of proper relationships between all the producing districts throughout the Nation. Four coal operators' associations, one for each of these states, and four district organizations of the United Mine Workers participated in the making of these contracts.

The method used in the determination of the wage agreements in the Central Competitive Field was that the coal operators representing the producers of the four states measured their ability to pay the wage rates upon their ability to compete with districts not parties to the contract embracing the Central Competitive Field and they usually insisted prior to arriving at an agreement that whatever wage increases were written into the Central Competitive Wage Agreement would necessarily have to be applied to competitors in outlying districts not parties to the Central Competitive Agreement. In the Central Competitive Field there was a uniform day wage standard for what are known as "day workers" and there was a uniform base rate for tonnage workers mining coal in seams of about the same thickness. There was also a tonnage level arrived at for thinner seams of coal properly related on a competitive basis to the base rate for the four districts.

Outside of the Central Competitive Field wage agreements were negotiated for the Eastern Pennsylvania District, the Maryland District, those portions of West Virginia that were organized, certain portions of Kentucky that were organized, and the states of Kansas, Missouri, Iowa, Oklahoma, Arkansas, Texas, Colorado, Wyoming, Montana, Washington and Michigan. Agreements were made in these districts after the base agreement was arrived at for the Central Competitive Field.

During the War an agreement was negotiated in the Central Competitive Field containing a clause to the effect that the contract as to wages, hours, conditions of employment, etc., should continue during the period of the War. After the Armistice in November, 1918, an international convention of the United Mine Workers of America met and during the course of its wage deliberations took occasion to declare that for all practical purposes the War was at an end and therefore instructed

the officers of the International Union to request a meeting with the coal operators of the Central Competitive Field for the purpose of considering modifications of the then-existing Competitive Field Wage Agreement. The operators refused to meet with the mine workers, contending that the War was not ended. In October, 1919, instructions to call a strike were issued in the Central Competitive Field. Operators remained adamant in their refusal, contending as late as November, 1919, that the War was still on. Disagreement ensued and a strike was called. Attorney General Palmer on behalf of the Government then stated that the Federal courts would be used to restrain the United Mine Workers from engaging in the strike in violation of the then existing Lever Act and Federal Judge Anderson issued an injunction restraining the miners from striking. The Policy Committee met in Indianapolis and in obedience to the court's order refused to strike. Subsequently the President of the United States appointed a commission known as the Bituminous Coal Commission which conducted exhaustive hearings in Washington. In January, 1920, the Commission made an award granting the mine workers an increase of 14% and a new contract for the Central Competitive Field was entered into on that basis.

Subsequently, on March 29, 1920, a joint conference was held in New York which resulted in the formulation of a joint interstate agreement which incorporated the Commission's Award. This agreement was to be effective until March 21, 1922. As the expiration date of the agreement approached efforts were made to begin new negotiations. The miners extended invitations to the operators to meet in a joint conference in Pittsburgh January 6, 1922. Illinois and Indiana operators accepted the invitation but operators in West Virginia and Ohio refused to participate. Because of inadequate representation the meeting was called off. The mine workers renewed their invitation to the operators to meet in a joint conference on March 2, 1922. Upon the non-acceptance of the invitation an official strike order was issued and the strike began April 1st. For the country as a whole 460,589 men, or 67% of the total number employed in the industry, were involved in the strike. The average number of days lost per man on strike amounted to 117. The strike was 100% effective in Michigan, Indiana, Illinois, Iowa and Wyoming. Other areas which were almost completely shut down (90% or above) were Central Pennsylvania, the Pittsburgh District, Ohio, Kanawha, Missouri, Kansas, Ar-

kansas and Montana. The result of this strike was a joint conference held in Cleveland on August 7, 1922, which resulted in a wage agreement.

On February 19, 1924, a joint conference, consisting of Illinois, Indiana, Ohio and Western Pennsylvania operators, was held at Jacksonville, Florida, which renewed the previous wage scale and was to be effective until April 1, 1927. Soon after the signing of the Jacksonville Wage Agreement most non-union operators reduced the rates, first to the 1919 scale and later to the 1917 scale or lower. The result of this wage cutting was to give these operators a competitive advantage, enabling them to cut their price and bring about a marked shift of tonnage from states north of the Ohio River to the states south of the Ohio River. In 1927 when the operators met with the mine workers they insisted that if they were going to make any contract in the future it would have to be on such a basis that the producers in the Central Competitive Field could compete with the producers south of the Ohio River. That means that the contract would have to be predicated upon the wage and hour standards and the kind of conditions that prevailed in non-union territory. The insistence of the operators in lowering wage standards brought about a strike in 1927 which lasted in many districts until the Fall of 1928. This strike involved the states of Illinois, Indiana, Ohio, all of Pennsylvania and portions of West Virginia and Kentucky. Some 250,000 men out of 550,000 employed throughout the Nation were out on strike. This strike terminated with the organization of mine workers remaining intact in the states of Indiana and Illinois but with complete disintegration of the organization in Ohio, Pennsylvania and in the Southern states.

Subsequent to the termination of this strike the operators began a war for markets which resulted in a complete destruction of wage standards, lengthening of hours of employment and a continuous degradation of conditions of employment. Continuous wage cuts were undertaken so that in states north of the Ohio River the wage rates for day workers which had been $7.50 a day fell to as low as $1.50 per day for from 12 to 14 hours' work. In the states south of the Ohio River wages dropped to a miserable pittance—in some places as low as one dollar a day to from 14 to 16 hours work. These conditions continued until the adoption of the Bituminous Coal Code under the National Industrial Recovery Act in 1933.

Before the Code was accepted by the industry a joint

conference of the United Mine Workers of America and the coal operators of the Appalachian region was had at Washington, at which time an agreement was arrived at setting up a standard of eight hours per day five days per week for the mine workers employed in the Appalachian coal fields. A day wage standard of $4.60 per day for skilled men was adopted with the application of an increase of 10c per ton on the combined cutting and loading wage for all tonnage workers, and an additional increase of 10% on all yardage rates and deficiency work; the $4.60 rate to become applicable to states north of the Ohio River and creating a differential of 40c in favor of southern mining districts, or a rate of $4.20 for skilled workers in states south of the Ohio River. With a differential of 40c less per day than the prevailing southern rate for the State of Alabama the application of these rates to the Appalachian territory established for the first time in the history of the bituminous coal mining industry a fairly competitive situation between producers in this area. The rates were then written into the Code and became a part of the law to be administered by the National Recovery Administration. This basis of wage standards, hours, conditions of ememployment became effective October 1, 1933, and continued until April 1, 1934, when, pursuant to the requirements of our collective bargaining agreement in the Appalachian coal fields, another conference was had in the City of Washington, at which time the hours were reduced from 8 to 7 per day, 35 hours per week. Skilled workers' wages were increased in states north of the Ohio River from $4.60 to $5 per day, with the maintenance of the 40c differential for states south of the Ohio River, or $4.60 per day. Alabama continued to enjoy a differential of 80c less than states north, placed on a basis of $4.20 per day. Corresponding increases were granted to tonnage workers and recognition of an additional 10% increase on yardage and deficiency rates. These rates were placed in the Code and continued in full force and effect until May 27, the date upon which the Supreme Court rendered its decision in the Schechter case. However, with the lapse of the Code the wage agreement continued, carrying with it the same wages and conditions of employment until April 1, 1935.

No new contract was arrived at April 1, 1935, because the original conference which was held in Washington in February, 1935, to make a wage agreement to supplant the one which was about to expire, had disagreed. However, pursuant to the request of the Presi-

dent of the United States the mine workers and operators agreed to continue the wage agreement in all of its provisions and conditions until June 15, 1935, and at that time at the urgent request of the Government the agreement was continued until July 1st and then until September 16 and then until October 2nd. On the last date a new contract was arrived at which provided for the maintenance of a 7-hour day, 35 hours per week, with an increase of 50c per day for day men and an increase of 9c per ton on all yardage and deficiency work. This agreement was arrived at after a stoppage which lasted for a period of 7 days. The new agreement continues until April 1, 1937. This is the so-called Appalachian Agreement.

The basis for the last three national wage agreements has been the Appalachian Area, including Pennsylvania, Ohio, West Virginia, Virginia, Maryland, and a portion of Kentucky and Tennessee. The Appalachian Area supplanted the Central Competitive Field as a basis for collective bargaining agreements because of the changed competitive conditions. The Appalachian Area employs some 315,000 men, producing 72% of the nation's tonnage. When collective bargaining agreements are entered into the wage standards in the various areas are usually based on the ability of produeers in each of the competing districts to pay the wages. Generally speaking, producers in one producing area are not willing to negotiate a collective wage agreement with their mine workers without knowing the wages that will be paid by competing producing districts. Thus, effective collective bargaining cannot be maintained in one field if other fields are operating on an individual basis.

While different wage scales are fixed for each district, taking into account competitive conditions between districts, it has been the practice for many years to fix hours of employment on a national basis. Coal operators in joint conference with the United Mine Workers of America have always insisted that uniformity as to hours must be maintained because it constitutes a very important factor in costs. During our recent Appalachian conference operators produced figures which purported to show that the transition from an 8-hour to a 7-hour day in the bituminous coal mining industry reflected an increase in cost of from 17c to 18c a ton.

The conclusion of a collective bargaining agreement reduces or eliminates the major cause of strikes, namely, the refusal to recognize the union. Also, collective

bargaining agreements themselves contain provisions penalizing so-called unauthorized strikes.

A checkweighman is employed by the mine workers and paid directly by them for the purpose of seeing to it that they receive honest wages for every pound of coal loaded on mine cars. The employment of a checkweighman imposes no burden on the coal operator. Coal operators in non-union territory have generally refused to permit mine workers to employ checkweighmen. In non-union coal territory mine workers have frequently been deprived of their honest weight in amounts varying from 10% to 50% of the actual amount of coal loaded on mine cars. This abuse became so chronic in the industry that it was the subject of several Federal investigations and inquiries by state legislatures. The practice has been universally condemned and was but an outgrowth of an insolvent business cheating its mine workers to enable it to remain in the markets. It was a concealed form of wage cutting for the purpose of gaining a competitive advantage.

It has long been the practice in non-union mining communities for companies to insist on employees occupying company-owned houses and trading in company stores. The company-owned house and the company store practice resulted in company-owned highways and company-owned towns. No meetings of any description could be had by mine workers which tended to promote trade unionism, civic betterment, improvement of health standards, or any degree of political freedom without the sanction of the company. Any coal miner who violated the edict of the company in any of these respects was summarily discharged and evicted from the company houses. This practice was long prevalent in that portion of the mining industry which was not organized and is still in force and effect in some non-union mining territories. Furthermore, by the compulsory use of the company store and the company-owned house the operator was enabled to charge higher rents and higher prices than were justified. The operator employing these devices was thus enabled to further sweat his wages and thus secure a competitive advantage over other operators. These practices are in reality a peculiarly vicious form of wage cutting. The mine workers have no objection to the maintenance of company houses or company stores provided employees may exercise the privilege of renting a house or dealing in a company store, or refraining from doing so. Wherever collective bargaining pre-

vails in the industry these abuses connected with company houses and company stores have never been resorted to by coal companies.

The testimony of F. E. BERQUIST with the exhibits referred to therein and admitted in evidence under the stipulation is as follows:

I am head of the Bituminous Coal Unit, Division of Review, National Recovery Administration. I have been connected with the National Recovery Administration since 1933. Prior to that time I was connected for a number of years with the Bureau of the Census and with the United States Bureau of Mines. All of the charts and tables hereinafter referred to in this statement were prepared under any direction.

Chart No. 20, with accompanying table No. 20a, gives the proportions of coal loaded for shipment of each of seven coal producing states with the aggregates of these seven states, by years, from 1913 to 1934. These seven states are the leading producing states of the country and represented 87% of the total shipments for the United States in 1933. The total shipments of the seven states are taken as 100%, for each year, and the shipments of each state are a percentage thereof. The shipments include only coal loaded in railroad cars and vessels and barges and do not include tonnage taken by truck or wagon, used at the mine, sold to local trade, taken by locomotives at the tipple, or made into coke at the mines. Tonnage loaded for shipment in the United States in 1933, amounted to 92% of total production; while for the seven selected states, shipments were 93% of their production. The data for this chart is furnished in the Minerals Year Book, United States Bureau of Mines.

Several noticeable changes in the relative importance of these seven states have taken place in the matter of shipments since 1913. The proportions for Pennsylvania and West Virginia have been nearly reversed. The former state accounted for 40% of the aggregate shipments of the seven states in 1913, as compared with 28% in 1934, while West Virginia advanced from 20% in 1913 to 33% in 1934.

Both Illinois and Ohio have lost in importance, while Kentucky and Virginia have gained. Indiana shows little change. The share of Kentucky advanced from 5.6% in 1913 to 12.9% in 1934.

Chart No. 21, with accompanying table No. 21a, pre-

sents an index of tons loaded at mines for shipments and realization, f. o. b., mine for selected competing areas from 1923 to 1933, and also an index of average hourly earnings for all miners for these selected competing states for specified years between 1921-22 and 1933. The particular states shown in this exhibit are:

Pennsylvania vs. West Virginia
Ohio vs. West Virginia
Ohio vs. Kentucky
Indiana vs. Kentucky
Illinois vs. Kentucky

These states were selected for comparison because they enter into competition with each other.

The average hourly earnings figures for all men were computed in the Bituminous Coal Section. The Bureau of Labor Statistics reports data, by states, for all day men and all tonnage men separately. These figures were weighted by the proportion of men (as shown by the Bureau of Labor Statistics), employed at tonnage work and day work to arrive at a figure for all men.

This chart shows in general that with the reduction in the differential in hourly earnings possessed prior to 1927 by the non-union Southern States and the resultant breakdown in labor union agreements in the Norther States during the period 1925-1927, shipments of Southern mines declined and Northern mines increased.

Data as to average hourly earnings are not available, as the charts indicate, for the years 1922-1923, but it is clear that very drastic reductions in wage rates were initiated in the South during the years 1922-1924. From 1919, following the Armistice, to the year 1921, abnormal post-war conditions in the industry prevailed—inadequate railroad facilities, car shortages, abnormal demand and high prices occasioned by post-war industrial inflation in this country and coal shortages in some European countries.

These tendencies came to a head in the industrial breakdown of 1920-1921. The resulting liquidation made normal conditions again operative. Southern producers seized upon these tendencies to deflate war-time wage standards. Beginning with 1922 and extending through 1924, drastic reductions were made in Southern areas in wage rates and labor costs, and the Southern wage differentials against the North increased. This action by the South[illegible] areas, in turn, practically forced a breakdown of u[illegible] greements in the North, followed by wage

reductions, which changed the pre-existing currents of interstate commerce in coal.

By way of illustration, if reference he made to a comparison of the performance of Pennsylvania and West Virginia, it will be seen:

1. Due to the breaking away of Pennsylvania from the Jacksonville Agreement in 1925 the average hourly earnings of all classes of mine workers was practically the same in 1926-1927 as it was in 1921-1922.
2. In 1926-1927 the differential and hourly earnings which West Virginia enjoyed over Pennsylvania were reduced to 3.7 cents as against 10.3 cents in 1921 and 1922. By the year 1933 the average hourly earnings in Pennsylvania were lower than in West Virginia or 37.1 cents an hour in Pennsylvania as compared with 38.3 cents in West Virginia.
3. As a result of these changes in competitive position the shipments of coal from Pennsylvania which had declined by the end of 1924 approximately 20 per cent from the 1923 base, after 1927, because of the withdrawal of Pennsylvania from the Jacksonville Agreement increased rapidly, advancing 15 per cent between the years 1924 and 1929.
4. On the other hand, the shipments from West Virginia during the period 1923 to 1927 increased 37.9 per cent, but after the collapse of the Jacksonville Agreement in Pennsylvania rapidly declined.
5. There was a general decline in both states in value realized per ton at the mine after the year 1926, undoubtedly due to the fact that the breakdown in wage rates brought about lower costs and prices.

Similar tendencies were exhibited by comparison of the performance of Ohio and West Virginia:

1. Due to the withdrawal of Eastern Ohio from the Jacksonville Agreement in 1925 and the complete collapse of the Agreement throughout the State beginning April 1st, 1927, the average hourly earnings of all classes of employees in Ohio in 1929 were 1½ cents lower than in West Virginia, as contrasted with the differential in hourly earnings enjoyed by West Virginia in 1921-1922, amounting to 12.3 cents per hour.
2. As a result of these drastic changes in relative positions the index of shipments from Ohio, the year

1923 being taken as 100, declined to 34.4 in 1928 and increased to 56.1 in 1929.

3. On the other hand, shipments from West Virginia, based on the year 1923 as 100, increased to 137.9 in 1927 but thereafter dropped to 131.7 in 1929.

Like tendencies are exhibited through a comparison of Ohio with Kentucky. During the period 1921-1922, Kentucky enjoyed a differential in average hourly earnings of its employees, as compared with Ohio, of 22.4 cents per hour. By 1929, however, the average hourly earnings in Kentucky were only 2.4 cents per hour lower than in Ohio. As a result of these conditions the shipments of coal by the Kentucky mines, which had advanced 57 per cent during the period 1923-1927, declined rapidly while, as I have already pointed out, shipments from Ohio rapidly increased between the period 1927-1929.

A comparison of Indiana and Kentucky discloses similar trends. In the period 1921-1922, Kentucky had a differential in average hourly earnings of its employees of 29.6 cents against Indiana; during succeeding years this differential increased to 45.1 cents per hour in 1927. In the Spring of 1928 the Jacksonville Agreement rate of $7.50 per day was reduced to $6.10 in Indiana and later, in 1932, to $5.00 per day, with the effect of a decline in the differential enjoyed by Kentucky over Indiana to approximately 29 cents per hour. As a result of these changes, shipments from the Indiana mines increased during 1929 while a downward tendency in shipments, as already pointed out, occurred in the Kentucky mines after the year 1927.

During the period 1921-1922, the average hourly earnings were 30.9 cents per hour less in Kentucky than in Illinois. The mines in Illinois passed through the same modifications of the Jacksonville Agreement as occurred in Indiana, with the result that the differential in hourly earnings possessed by Kentucky declined to approximately 25 cents per hour. This change in labor costs have a stimulating effect upon Illinois shipments, which advanced from an index of 57.9 in 1927 (1923 being taken as 100) to 75.5 in 1929.

As to realizations, or prices realized at the mines during this period, the break came first from the Southern fields, due to the wide differentials which they possessed, but throughout the period, from approximately 1924-1933, the Southern States maintained a uniform position of advantage over the Northern States.

F. E. Berquist

Chart No. 22, with supporting table No. 22a, shows a similar treatment of production and realization for selected competing areas. The areas compared are Northern West Virginia as against Western Pennsylvania; Western Pennsylvania, Ohio and Panhandle of West Virginia as against Southern High Volatile (including portions of Southern West Virginia, Eastern Kentucky and Tennessee); Western Kentucky as against Indiana and Illinois, Western Kentucky and Southern High Volatile as against Indiana and Illinois. This chart is significant because it shows the realizations as between competing areas which enable a more accurate picture to be obtained than from Chart No. 21, which shows a comparison between entire states which are not as strictly comparable as competing areas.

Chart No. 23 shows an index of tons loaded at mines for shipment and realization, f. o. b., mine, during the period of the Jacksonville wage agreement (1924-1927) for selected competing states.

The data shown in this Chart are based upon publications issued by the U. S. Bureau of Mines. This Chart proposes to compare two competing states as to their tons loaded for shipment and their sales realization per ton f. o. b. the mine. Tons loaded at the mine for shipment were used in order to consider that portion of the production which is more likely to enter into interstate commerce. The data are shown in percentages based upon the year 1923.

The year 1923 was selected as a base because, except for the first two months when some railroad congestion existed, no significant disturbing elements appeared. Efforts were made to use a five year average, 1919 to 1923, but were found to be unsatisfactory because that period included a number of abnormal situations. For example, in 1919 general strikes occurred; in 1920 a runaway market with panic prices was found; in 1921 a general depression existed in most industries; and in 1922 a general suspension of mining again took place. The year 1923 was selected as a base also because it is the closest "normal" year to the beginning of the Jacksonville Wage Agreement period, April 1, 1924, to April 1, 1927.

In each comparison, broken lines were used to indicate states which were predominately non-union, while the solid lines indicate states operating on a union basis, and in which the bulk of production was produced under the terms of the Jacksonville contract. It must be remem-

bered that the Jacksonville contract specified a $7.50 basic day rate, while in the non-union states, although no single wage rate can be shown because of the variety of rates at various mining operations, it is generally known that they ranged between $4.00 and $5.00 a day.

Beginning on the left side of the Chart and comparing Pennsylvania and West Virginia, we find that by 1924 West Virginia's shipments were only 4 per cent less than the base year, while in Pennsylvania the decrease in shipments amounted to 20 per cent, indicating that the area which was paying the Jacksonville scale lost in tonnage more rapidly than the area which did not pay that scale. This is further shown in the realization emparison. Pennsylvania, because of the specifications in the Jacksonville scale, could not reduce its realization as rapidly as in West Virginia where many operators had ceased to pay Jacksonville rates and, therefore, could lower their sales realization in order to secure tonnage. From 1924 on to 1926 West Virginia's gain in shipments was continuous and amounted to about 40 per cent. In Pennsylvania no gain in shipments is shown until early in 1925, when many operators ceased to pay the Jacksonville scale and became non-union so that from 1925 on Pennsylvania and West Virginia drew closer together in production and in realization. The cessation of wage payments on the Jacksonville scale in Pennsylvania in 1925 is reflected by the lower realization appearing at the same time. The decline in shipments in Pensylvania in 1927 reflects the strike condition, whereas West Virginia continues to show an increase.

Turning next to a comparison of Ohio and West Virginia, the contrast in tons loaned for shipment is more pronounced because Ohio was more organized than Pennsylvania, and therefore more of its production came at the Jacksonville rate. Thus we find that West Virginia's shipments declined 4 per cent in 1924 from the base year and Ohio's shipments declined 26 per cent for the same period. After the Jacksonville Agreement came into effect, the divergence widens. Ohio consistently loses tonnage until 1925 when it began to break away from the union and the Jacksonville scale, while West Virginia, on the contrary, consistently gains in tonnage. Not until 1926 do we find the realization in Ohio approaching that of West Virginia. Again the decline in production in 1927 in Ohio is to be attributed to the strike, as is also the gain in shipments in West Virginia, so that by 1927 West Virginia had gained 38 per cent in

shipments and Ohio had lost 66 per cent in shipments, as compared with the base year 1923.

The next comparison is between Ohio and Kentucky and shows that when the Jacksonville Agreement became effective the divergence in shipmnts between Kentucky and Ohio widens considerably. Kentucky, from 1924 to 1927, shows a consistent gain in shipments, amounting to a total of 57 per cent for the period, whereas Ohio lost approximately 64 per cent. Similarly, in comparing realization, we find that Ohio was not able to lower its sales price f. o. b. the mine until it began to break away from the Jacksonville wage scale; but at all times Kentucky's realization decreased more rapidly than had that of Ohio, again explaining Kentucky's gain in tonnage in contrast with Ohio.

In comparing Indiana with Kentucky, we find that Indiana, a highly organized state, lost approximately 18 per cent in shipments by 1924 and then remained fairly constant, showing a slight gain in the year 1926 and then a sharp decline in 1927 due to the strike. Kentucky's shipments, as in the preceding chart, show a consistent increase in tonnage. In comparing the realization of the two states, we find that Indiana, bound to the rigid specifications of the Jacksonville scale, was not able to reduce its realization to the same degree as Kentucky, whose flexible wage rates allowed reductions in price f. o. b. mine.

The comparison between Illinois and Kentucky shows a similar situation to that which applied in the comparison of Indiana and Kentucky. Illinois being perhaps the most highly organized state in the country held rather rigidly to the Jacksonville scale during the period of the agreement and so was scarcely able to reduce the realization, whereas Kentucky throughout the period shows ability to reduce realization, as has already been pointed out.

A factor to be kept in mind throughout these comparisons is the effect of the British general strike, May to September, 1926, and the consequent increase in production and temporary increase in price.

The conclusions to be drawn from this Chart are that those states during the Jacksonville period which were predominantly union were compelled to comply with the established contract wage rate, and since the wage cost represents approximately 60 per cent of the total cost, operators in those states were not able to reduce the sales price f. o. b. the mine sufficiently to compete with the non-union operators paying lower than Jacksonville

scale wages and therefore reducing price f. o. b. mine and so securing a part of the market which formerly went to the high wage states.

Chart No. 24 shows the same facts as Chart No. 23, but for producing areas rather than for whole states.

The purpose of these divisions is to bring out still more clearly the difference between Union and non-union areas. For example, data for the whole state of Pennsylvania would be based upon both union and non-union operations. If however, we turn to Western Pennsylvania only, we can detect rather clearly the point at which the operators broke from the Jacksonville scale. From that point on, West Pennsylvania gains in shipments and lowers it realization in order to compete more effectively with Northern West Virginia, which had broken from the Jacksonville scale somewhat earlier. Similarly, if we compare Western Pennsylvania and Southern West Virginia, we find that the divergence in shipments is even wider than was true in the comparison of Western Pennsylvania and Northern West Virginia. That is to be explained by the fact that throughout the period Southern West Virginia was nonunion, whereas Northern West Virginia had been union until 1925. The comparison between Central Pennsylvania and Southern West Virginia does not show a great contrast because both areas were on the non-union basis.

The lower portion of the Chart does bring out a wide contrast in shipments and realization because the areas being compared are either union or non-union. For example, Ohio until 1925 continued on the union basis, and Indiana and Illinois were strongly union throughout the period. In contrast, Northern West Virginia broke from the union earlier than Ohio. Eastern Kentucky was unorganized throughout the period and Western Kentucky ceased to operate on a union basis after 1925. Here again we find that those areas operating under a union contract and meeting the rigid specifications of a $7.50 wage scale were unable to compete effectively with the non-union areas and lost tonnage. The inability to compete effectively is indicated by the fact that price f. o. b. the mine in union areas could not be reduced as rapidly as in the non-union areas.

Chart No. 25 shows a comparison of average hourly earnings of bituminous coal miners in selected competing states for specified periods. The periods covered are those for which data is available in the publications of United States Bureau of Labor Statistics. The states selected for comparison are West Virginia and Pennsyl-

vania; West Virginia and Ohio; Kentucky and Ohio; Kentucky and Indiana; Kentucky and Illinois. This chart shows that average hourly earnings in West Virginia were below those in Pennsylvania in 1919, 1924, 1926-1927, 1929 and 1931, were above those in Pennsylvania in 1921-1922, and were substantially the same in 1933; the average hourly earnings in West Virginia were below those in Ohio in 1919, 1921-1922, 1924, 1926-1927 and were above those in Ohio in 1929, 1931 and 1933; that average hourly earnings in Kentucky were below those in Ohio in 1919, 1921-1922, 1924, 1926-1927 and 1929, were above those in Ohio in 1931, and were substantially the same in 1933; that average hourly earnings in Kentucky were considerably less than those in Indiana and Illinois in all of the years since 1919 for which data are available.

Table No. 26 shows by the production of bituminous coal in each state during the years 1913 to 1934, inclusive, and the proportion of the production of each state to the total production of the United States.

Table No. 27 shows the average value per ton of coal at the mines in each state from 1913 to 1934, inclusive.

Chart No. 28, with accompanying Table No. 28(a), shows the effect of three trikes, those in 1919, in 1922 and in 1927 on the production for selected competing states.

Chart No. 29, with accompanying Table No. 29(a), shows the monthly production of bituminous coal for the years from 1917 to the middle of 1933, in the states of Pennsylvania, Ohio, and West Virginia, and also the number of man-days lost per year due to strikes and lockouts in the years from 1917 to the middle of 1933 in these same states.

Chart No. 30, with accompanying Table No. 30(a), shows the same data for the states of Indiana, Illinois and Kentucky.

Tables No. 31, 31(a) and 31(b) show a comparison of wage scales in union and non-union mines which are available in published sources. That data in Tables 31 and 31(a) are taken from hearings before the Committee on Interstate Commerce of the Senate in 1928 and the data of Table 31(b) is taken from the May, 1929, issue of the publication "Coal Age."

Chart No. 32 shows a comparison of indices of f. o. b. mine prices of bituminous coal with certain prices during the period between 1923 and 1934. The price in 1923 was taken as a base and the percentage of variation of the mine price of bituminous coal is compared with the percentage of variation of the price of all com-

modities exclusive of farm products and foods, with the prices of metal and metal products; and with the prices of anthracite coal.

The testimony of DR. HOMER L. MORRIS, admitted in evidence under the stipulation is as follows:

I was born in Dublin, Indiana, in 1886, and was educated at Fairmount Academy and graduated from Earlham College, Richmond, Indiana, in 1911; received the degree of Ph. D. at Columbia University in 1921, having specialized in economics and political science. I am the author of a book entitled "The Plight of the Bituminous Coal Miner," published by the University of Pennsylvania Press in 1934.

I was instructor of history in Penn College, 1911-1915, and instructor in economics at Hunter College, 1917-1918; professor of economics, Earlham College, 1918-1928; director of Child Feeding Work in the Berlin District, Germany, under the auspices of the American Friends Service Committee, 1921; field director of famine relief in the Buzuluk District, Russia, under the auspices of the American Friends Service Committee, 1923. Served as Special Commissioner of the American Friends Service Committee to study health conditions among children in the Ruhr District in Germany during the French occupation of the Ruhr. I have been a member of the American Friends Service Committee since 1917 and at the present time I am secretary of the Social-Industrial Section of that Committee. The headquarters of the American Service Committee is 20 South 12th Street, Philadelphia. In 1928-1930 I was director of public relations of the Reading Hospital, Reading, Pennsylvania. From 1930-1934 I was professor of economics, head of Department of Economics, Fisk University.

From 1933 to 1934 I was Field Supervisor for the Division of Subsistence Homesteads, Department of the Interior, in the establishment of homesteads primarily for the mining group.

In the spring of 1931 President Hoover asked the American Friends Service Committee to undertake the program of child feeding in the bituminous coal fields. This action was taken as a result of the investigation made by the Children's Bureau under the direction of Miss Grace Abbott. This investigation revealed such dire need among the children of the miners that the Children's Bureau appealed to President Hoover that some national action be taken to relieve the situation.

Dr. Homer L. Morris

President Hoover asked the American Friends Service Committee to undertake this service, which they agreed to do. I was asked become organizer and field director for that work. During 1931 and 1932 child feeding program was undertaken in 690 schools in 40 counties scattered through six States, those States being Pennsylvania, West Virginia, Kentucky, Tennessee, Illinois and Ohio. We had a corps of about 50 workers organizing and directing this child feeding program. The workers came under my supervision. In the annual reports of 1932-1933 of the Service Committee will be found a record of this work.

These contacts with the miners, operators, and public officials in counties and States where we worked gave an unusual opportunity to observe conditions in the coal fields and to study the social economic and industrial forces which impinged on the coal industry. This lead me to make a special study of conditions, especially in West Virginia and Kentucky. I published the results of this investigation in a book entitled "The Plight of the Bituminous Coal Miner," published by the University of Pennsylvania Press in 1934. I had the benefit of the experience of a corps of 50 workers in making this study and had six special assistants making detailed investigations for a period covering one to six months. I spent practically two and one-half years in making this study, from 1931 (September) until the end of 1933.

My study grouped itself briefly under the following topics: the plight of the coal mining industry itself, the number of miners needed, the unemployed miner and his family, the fact that if a man is once a miner he is always a miner, the training and skill of the laborers, their living conditions in company-controlled communities, the extent and effects of unemployment upon them, something of the miner's mental processes and his reactions to the conditions in which he lives, some suggestions as to how mining could be improved by improving his condition and his relationship to the industry, the laborer's economic status, his ambitions and desires, rehabilitation of displaced miners, and comments upon my idea of the obligations of the Government to help in the process of retrading the displaced worker. I also examined and commented upon the way in which England deals with the situation and particularly in the way she transfers her surplus miners.

In 1919, 70% of the bituminous coal was produced under union wage agreements, and in 1924 the operators and miners in the central competitive fields, including

Illinois, Indiana, Ohio and Western Pennsylvania, signed the Jacksonville agreement which extended the wage agreement for three years and established a wage scale of $7.50 for a basic eight-hour day and $1.08 a ton for piece workers. The southern operators in West Virginia, Kentucky, Tennessee and Alabama began to take advantage of of this high wage scale. The New River field in West Virginia desired the union in 1921, and Alabama refused to continue to recognize the wage agreement. In 1924 western Kentucky refused to be bound by the Jacksonville agreement. In 1925 the Bethlehem Mines Corporation and the Consolidation Coal Company in West Virginia severed their connections with the union. The lack of union regulation and wage standards, leaving each operator free to determine his own wage scale upon the basis of individual bargaining; gave the new non-union fields an advantage in the highly competitive market. This was soon reflected in production. In 1922 the non-union fields produced about 22% of the total bituminous coal output. By 1925 this had increased to 60% and amounted to 80% in 1930. In West Virginia the most important unorganized fields' production increased from 71,254,000 (71,309,000 ?) net tons in 1913 to 107,900,000 net tons in 1923 and amounted to 138,519,000 net tons in 1929, an increase of 94% in 16 years. In the non-union territory of Kentucky the development was even more pronounced. Production increased from 19,617,000 net tons in 1913 to 44,777,000 net tons in 1923, an increase of 128% in the decade, and reached to 60,463,000 net tons in 1929, an increase of 35% in six years. Production in the union fields of Ohio, Indiana and Illinois decreased from 146,086,000 net tons in 1923 to 102,691,000 net tons in 1929, a loss of 30%. Since the World War the center of the bituminous coal industry has shifted from the unionized fields of the North to the non-union fields of the South. The payment of the lower wage scale hastened the development of the coal industry in the South and brought new sources of supply on the market which were not needed to supply the demand of the country. The production figures given came from the reports of the Bureau of Mines.

Coal production reached the peak of 579,000,000 net tons in 1918. In 1919 there was a slump of almost 20%; in 1920 there was a slight rebound to 569,000,000 net tons. This level was not reached again until 1926 and even in the boom year of 1929 production reached only 535,000,000 net tons. By 1930 there was a decrease of 18% below even the 1920 level. Regardless of the decreased

demand for coal, after 1918 the productive capacity of the industry continued to increase for the next five years even faster than before the War. In West Virginia and Kentucky the industry continued to expand until 1927. The productive capacity of the operating mines working full time in 1918 was 717,000,000 net tons. By 1920 this increased to 796, 000,000 net tons, or an increase of 11%. It climbed to 970,000,000 net tons in 1923, an increase of nearly 22% in three years.

The number of commercial mines increased from 8,319 in 1918 to 9,331 in 1923, an addition of more than 1000 new commercial mines during the five-year period when the demand for coal was decreasing. During this period more than 3,000 wagon mines were opened. From the peak of 1923 the relentless force of competition reduced the number of mines each year except 1926, until there survived in 1931 5,642 commercial mines. The reason for this expansion was that the unorganized fields of the South were being opened or production was shifted from the central competitive fields to the southern territory, and the expansion in spite of the decrease in demand continued in Kentucky and West Virginia until 1927. In West Virginia in 1900 only 29,163 miners were employed; by 1923 the number had increased to 117,300. But the point of highest employment of miners in West Virginia—119,799—was not reached until 1927. In Kentucky the number of miners in the State increased from 9,680 in 1900 to 60,811 in 1923 and continued to increase until 1927 when there were 64,747 miners employed.

Employment of bituminous coal miners reached a peak of 705,000 in 1923. There has been a decrease in the number of miners employed each year since 1923, with the exception of 1926 and 1927. In 1929 503,000 miners were employed; in 1931 only 450,000 miners were employed. In July 1932 the number dropped to 294,758. Between 1923 and 1929, years in no way connected with the depression, 202,000 miners were pushed out of the industry.

The decrease in the employment of miners has not fallen with equal force in all parts of the bituminous territory. Between 1923 and 1930 the ranks of the miners were decreased by 33% in Pennsylvania, 46% in Illinois, 53% in Ohio and 61% in Indiana. These States represent the unionized territory. In the non-union fields of Kentucky and West Virginia the employment trend between 1923 and 1929 did not conform to the trend in the industry as a whole; in fact, the number of miners in these States continued to increase until 1927, and the down-

ward swing there did not start until the next year. Production increased for four years in this new non-union territory after retrenchment began in the other section of the coal fields, and this contributed largely to the over-expansion of the coal industry. Between 1927 and 1930 there was a decrease of 11.5% in the number of employed miners in West Virginia and 12.5% in Kentucky.

In the central competitive field the reduction in the number of miners employed began in 1923. This was during a period of general upswing of business many of the displaced miners were able to secure jobs in the nearby industrial centers. In West Virginia and Kentucky the reduction in the number of miners employed did not begin until 1928. Although the number of miners displaced in these States was not as great as the Northern States their plight was worse. They were located in rural sections far removed from industrial centers. Because the expansion of the coal industry continued longer in these States than in the northern States, the displaced miners had less time to gain a foothold in other industries before the crash in 1929. The expansion in the southern fields was due in no small part to the fact that labor was unorganized and a lower wage scale prevailed in the southern fields than in the unionized competitive field.

The source of mine labor in Kentucky and West Virginia. When the mines were opened in Kentucky and West Virginia the operators found cheap and unorganized labor near at hand. Of the 956 miners interviewed in my study, 24% of those in Kentucky were born in the county in which they now live, 20.6% in adjacent counties, an additional 18.7% within the State. This makes a total of 63.3% who were natives of the State in which they now live; an additional 24.2% were born in the adjoining States of Tennessee, Virginia and West Virginia. It is significant that in this group of miners only two were born in Ohio, bordering on the north, none in Indiana and only one in Illinois, that is, the source of the labor supply was either local or drawn from farther south. In West Virginia, 46.4% of the miners interviewed were natives of the States; 18.7% born in the county in which they now live, and 34.4% in adjacent counties. 81.2% were native whites; 11% were negroes, and only 7.8% foreign-born.

When the mines were opened in Kentucky and West Virginia the operators were able to draw their labor from the farms and hills of Kentucky and West Virginia. Insofar as the labor could not be supplied locally it was drawn from farther south. Almost for the first time

negroes were drawn into the mines. This was done first as strike breakers. In Kentucky 84.2% of the miners are whites, 13.6% negroes, and only 2.2% foreign-born. In West Virginia 21.8% of the miners are negroes, 61.2% native whites, and 17% foreign-born. In Pennsylvania 55.4% of the miners are foreign-born and only 1.4% negroes. In Illinois 38.3% are foreign-born, 2.4% negroes; in Ohio 30.5% are foreign-born and 1.9% negroes.

Attempts at organization in southern fields. During the War and immediately afterwards the unions did gain a foothold in West Virginia and Kentucky but this proved to be temporary. About half of the 100,000 miners in West Virginia were reported to have been members of the United Mine Workers in 1920 and in Kentucky their membership was more than 18,000. The operators were determined to defeat his union movement at all costs. The leaders provided by the miners' organization were neither clever nor aggressive enough to hold the ground which they had gained during the prosperous years. The names of Domingo, Logan, Kanawha, Harlan and Bell Counties are all associated with lost causes in the history of the United Mine Workers' attempt at organization. By 1929 the membership in Kentucky had dwindled to 1,500 and in West Virginia the paid-up membership was alleged to be barely 600.

Approximately half of all the bituminous coal miners in the United States in 1922-23 lived in company-owned houses. This percentage varied in different coal fields, ranging all the way from less than 9% in Illinois and Indiana to 64% in Kentucky and almost 80% in West Virginia. These figures are taken from the report of the United States Coal Commission. The report of the United States Coal Commission, 1925, Part III, pages 1430, 1435, 1431, 1436-1437, 1469, 1467 made a very exhaustive study of housing conditions. The Coal Commission made a special study of 713 company-owned communities. More than two-thirds of all the houses were finished outside with weatherboard, usually nailed directly on the frame, with only paper for sheeting and even this was often missing. The houses were built without cellar and usually perched on post foundations. Only 38% of the houses were plastered; 2.4% had bathtubs and showers. 3% had inside flush toilets and 13.8% had running water. The Commission scored these communities on the basis of eight different factors and then rated each community on the basis of 100. Only 66 out of 713 received a score of 75 or above.

32 of these communities were in West Virginia and only six in Kentucky. Of 81 communities receiving scores of less than 50, 26 were in West Virginia and 23 in Kentucky. Nothing needs to be added to the indictment made by the Commission after its exhaustive investigation and report.

> "In the worst of the company-controlled communities the state of despair at times runs beyond the power of verbal descriptions or even photographic illustrations, since neither words nor pictures can portray the atmosphere of abandoned dejection or introduce the smells. Old, unpainted board and batten houses—batten going or gone and boards fast following, roofs broken, porches sagging, steps staggering, and riots of rubbish and a medley of odors—such are the worst camps. They are not by any means in the majority, but wherever they exist they are a reproach to the industry and a serious matter to such mine workers and mine workers' families as are dependent upon the companies for living facilities."

The company-owned camps were built to provide living accommodations for the workers. Although a system of control has been established and carefully developed in order to dominate the workers, it was probably inevitable that such a policy should have been developed since the primary purpose of a camp is to provide dwellings for the workers only so long as they remain in the employment of the company. The miner living in a company-owned house is far less independent than the miner living in an outside community. In the latter situation he is entitled to the protection of the tenancy laws of the State which gives him surety of tenure and guarantees him a certain number of days of grace before he can be evicted.

The lease which the miner is required to sign before he moves into the company property differs in phraseology from camp to camp but they all have the common purpose of depriving the miner of protection under the tenancy laws. These leases usually specify that the miner forfeits his right to occupy the house as soon as he ceases to work for the company, whether this termination of employment is brought about by voluntary withdrawal or by discharge. The lease frequently requires the miner at the termination of his employment and without further notice immediately to remove his

furniture and family from company property. In some cases the company is given the right immediately to enter the dwelling and remove all goods and possessions with the specific provision that it is relieved of all responsibility for the care of these goods and all other liability for damage to them during their removal. The company usually is authorized by the lease to deduct the rent for the property from the miner's wages semimonthly. The provision is frequently added that if the premises are not vacated at the termination of the lease, the company has the right to deduct from any wages it owes the miner $2 per day for each day of delinquency. One lease has been examined which specifies that if the renter moves or attempts to move his furniture from the property when his rent is unpaid, such act shall be deemed fraudulent and clandestine, entitling the landlord to seize the goods at any time within 30 days. Some leases specify that the renter shall neither harbor any person objectionable to the company nor permit him to use, occupy or to be on the premises. Furthermore, the renter must agree to remove any such objectionable person upon the request of the company. Some leases grant only to the miner and his immediate family the right to ingress and egress to and from the house. Frequently the miner is prohibited from keeping boarders who are not in the employment of the company. Some leases stipulate that all streets, alleys, lanes or highways about the premises are private property, subject to any police regulation which the company may make. The companies frequently reserve the right to keep from the premises any person they may deem undesirable. The companies not only reserve the right to exercise all police power but in some leases they retain the right to enter the premises at any time to enforce the provisions of the lease. Some leases go so far as to state that the lessee expressly waives any benefit or protection to which he might otherwise be entitled by law.

It is true that the provisions of these leases are not always strictly enforced. In some instances the miner is permitted to occupy a company house after ceasing to work for the company on account of an accident, illness, prolonged period of unemployment, or incompetency caused by old age. This privilege is frequently given to the miner's family after his death. But these are all privileges apart from the letter of the lease and continue only by sufferance. They may be terminated at any time, depending upon the whim of the com-

pany. They are not rights to which the miner is entitled or upon which he may depend with any degree of assurance.

Most companies when they have houses to rent require the workers to move into the camp. If men live outside because of a shortage of houses in the camp they are usually first to be laid off during the slack season and the last to be taken on when production is stepped up. The real import of these regulations is apparent during periods of labor difficulties. At such times the evidence is overwhelming and indisputable that the constitutional guarantees of freedom of speech, freedom of the press, and the right of assemblage are abrogated. These restrictions apply not only to the residents on company-owned property but to any outsider who attempts to enter the community, especially if he is suspected of being connected with a labor organization. The significance of all this lies in the fact that it is at just such times of stress and conflict when the laborer is attempting to protect his standard of living that he needs most the protection of the tenancy laws of the State and the security to which his domicile is supposed to entitle him. But the lease in a company-owned community gives to the operator the power and the right to restrict the miner's movements and to evict him and his family without any possibility of redress. This picture is not typical of all company towns. There are company towns where housing conditions are deplorable; there are some company towns where housing conditions are very good, but even where housing conditions are the best the restrictions upon the rights of citizenship are the greatest during strikes and industrial difficulties.

The miners in a camp are huddled physically close together; although every vestige of social cohesion is broken by industrial conflict, fear, jealousy, suspicion, intimidations and acts of violence are all mobilized by conflicting groups. The battle of Evarts at Evarts, Kentucky, on May 5, 1931, in which four men were killed and several wounded, was only one phase of the civil warfare in the community. The notes from a special investigator six months later under date of October 16, gave a glimpse of the continued bitterness in the community. "So bitter is the strife in Evarts that eleven injunctions and law suits have been started by the rival factions in order to gain control of the school system before the schools open in the autumn. This morning we called upon the president of the school board. He is a kindly old man apparently dazed by

his recent rough experience. When miners were evicted last spring after the strike he let some families live in some of his empty cottages in the town. A soup kitchen was opened in one of them. During the summer this kitchen was blown up by a bomb and Mr. Middleton was arrested on a charge of criminal syndicalism, which is a phrase whose meaning he has never been able to fathom. He was finally released but another member of the school board who also let strikers move into some empty houses is still under $20,000 bond for the same offense. A merchant of the town whose wife fed 40 school children for about six weeks last spring has been hounded out of town. She was in hiding about four months and has only recently returned home. Two local men who had a shack from which they distributed relief funds for some radical out-of-town organizations were shot and killed one night a couple of months ago."

Following the collapse of the strike called by the West Virginia mine workers in the summer of 1931 there were wholesale evictions in many camps in the Kanawha fields. According to the statement of Frank Keeney, President of the Union, 439 families in the Cabin Creek District were evicted from company houses by the middle of October. This does not include the judgments which had been granted but not executed. These evictions continued for many months after the strike was over.

The effects of excessive competition. The extent to which cheap coal flooded the market is illustrated by the bids for locomotive coal opened February 29, 1932, by the New York, New Haven & Hartford R. R. Co. There were 36 bids which offered almost 4,000,000 tons of locomotive coal for 80c and less per ton. The rail road company awarded the contract to the lowest bidder at the rate of 61c for 50,000 tons and 64c for 200,000.

After the coal for the early part of 1932 was purchased the New York, New Haven & Hartford R. R. Co. sent the following letter to the unsuccessful bidders:

"Gentlemen:

"For your information there is attached a tabulation in the order of price of bids for locomotive coal at 80c and less per ton, received February 29, 1932, which shows, after eliminating duplications, that several times our annual requirements have been offered us at 80c and less as follows: 1,250,000 tons offered at 75c and less; 1,645,000 tons offered at

75c down to 70c; 1,080,000 tons offered at 80c down to 75c; 3,975,000 tons offered at 80c and less.

"The most favorable bid having been accepted, we are now ready to discuss the purchase of the remainder of our locomotive coal for the period April 1st, 1932, to March 31st, 1933.

"As there is so much coal available at the prices quoted on the attached tabulation, I hope you are in position to offer coal at competitive prices. Would like to have you bid promptly if you are interested or a word that you are not interested at this time in business at these prices if that is the case, in which case, will consider you in further purchases when we all hope conditions will be more favorable."*

When this letter was published, the editor of the Fairmont Times remarked that the prospects are that the railroad company will buy their 1932 requirements at 20c to 30c less than last year, all at the expense of the miner.

Competition became so keen that even the United Mine Workers Union in northern West Virginia in District 31 joined in the process of wage cutting. In order to save the union and to meet competition the organization entered into an agreement with the union operators to accept a 25% wage cut as of October 1, 1931, which reduced the basic loading rate to 21½c per ton. The non-union operators charged that this agreement was only a clever trick to out-scab the scabs. At the time the agreement was made 67.5% of the coal in that region was being produced by non-union operators, and only about 5% of them were paying less than the prevailing union rate of 30c per ton. Most of the operators were paying from 30c to 40c per ton. The editor of the Fairmont Times asserted that "as a result of this agreement the entire wage structure of northern West Virginia crumbled into ruin. The big companies reduced their scales to the 30-cent level and the smaller companies have been forced to come down to a point where they can meet the price cutting competition of the unions." Following this agreement the Montfair Gas and Coal Company operating the Francis Mine in Harrison County on a non-union basis, announced a 25% wage cut, making a basic loading rate of 22c per ton.

*This letter was published in the Fairmont Times, Fairmont, W. Va., March 14, 1932.

Dr. Homer L. Morris

The operators in the northern West Virginia field tried to place the onus of this wage cut in the unions. Yet similar wage reductions were taking place in every non-union section of the southern field. In some of the so-called outlaw mines, the loading rates were reduced to as low as 12½c per ton.

Labor costs largest item in production of coal. Labor costs constitute by far the largest item in the cost of producing coal. Even in 1931 with the very low wage scale, the labor costs in 150 mines located in 17 States ranged from 52.5% to 91% of the total cost of production. In only four of the 150 mines were labor costs under 60%. In more than 60% of the mines the labor costs ranged from 70% to 79%. Hence when an operator considers the reduction of cost he usually thinks first of labor cost, and a reduction in the price of coal which he quotes almost invariably means a reduction of the wage scale.

Thereupon the parties, by written stipulation, filed as part of the evidence to be considered by the Court a contract between Hickman William & Company and Southern Extract Company, and accepted by Harlan-Wallins Coal Corporation, dated June 24, 1935, as typical of the contracts made by the plaintiffs, Harlan-Wallins Coal Corporation, Green-Silvers Coal Corporation and P V & K Coal Company, after October 2, 1933, and prior to August 30, 1935, referred to in the evidence in this cause, said contract being identified as Exhibit "A" to said written stipulation; and also a contract between the Kearns Coal Company, of Cincinnati, and Oglebay Norton & Company, as Agent for the American Radiator Company, approved and accepted by the Harlan Collieries Company, dated April 29, 1935, as typical of the contracts referred to in the evidence and made by all the plaintiffs, other than said Harlan-Wallins Coal Corporation, Green-Silvers Coal Corporation and P V & K Coal Company, after October 2, 1933, and prior to August 30, 1935, said contract being identified as Exhibit "B" to said written stipulation.

Thereupon in open court the parties by agreement, and at the suggestion of the court, filed the following exhibits: General Order No. 1 of the National Bituminous Coal Commission; General Order No. 2 of the National Bituminous Coal Commission; General Order No. 3 of the National Bituminous Coal Commission; Form of Acceptance of Membership in Bituminous Coal Code;

Form of Notice to Bituminous Coal Producers of District Board Organization; Form of Affidavit of Service of Notice of Organization Meeting of District Board; Form of Proxy for Organization Meeting of District Board; Form of Affidavit of the Tonnage of Producers; General Order No. 4 of National Bituminous Coal Commission Providing for Provisional Approval of Marketing Agencies; General Order No. 5 of National Bituminous Coal Commission Designating the Employes' Member of the Respective District Boards; General Order No. 6 of the National Bituminous Coal Commission Deferring the Filing of Reports by Producers; TD-4596, being regulations relating to the tax on the sale or other disposal of Bituminous Coal issued to Collectors of Internal Revenue, etc.; Form No. 1 (coal) Treasury Department Internal Revenue Service of Producers Return to be used in reporting monthly sales; said exhibits being identified as Exhibit "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," and "O," respectively.

The foregoing is a full and correct statement of all the evidence offered, heard or rejected on the trial of this cause, together with the objections of counsel to said evidence, the rulings of the Court thereon and the exceptions of counsel to such rulings; and the same is hereby approved and ordered made a part of the record in this cause for the purposes of appeal, without being spread at large upon the order books of this court.

This the 23 day of November, 1935.

Elwood Hamilton,
U. S. District Judge.

STIPULATION—Filed November 23, 1935.

It Is Stipulated that the tables and charts attached to and identified in the statements of Frederick C. Tryon, Charles O'Neill, H. L. Findlay, George W. Reed, Fred S. McConnell, Phillip Murray, F. E. Berquist and Homer L. Morris, which statements; with said charts and tables,

were permitted by the Court to be filed in the record as the avowals of said named parties; the contract between Hickman Williams & Company and Southern Extract Company, and accepted by Harlan-Wallins Coal Corporation, dated June 24, 1935, and the contract between Kern Coal Company of Cincinnati and Ogelsby, Norton & Company as agent for the American Radiator Company, approved and accepted by the Harlan Collieries Company, dated April 29, 1935, said two contracts being filed with and attached to a stipulation filed herein as Exhibits "A" and "B" to such stipulation; and also that the following exhibits filed in this cause, to-wit: General Order No. 1 of the National Bituminous Coal Commission; General Order No. 2 of the National Bituminous Coal Commission; General Order No. 3 of the National Bituminous Coal Commission; Form of Acceptance of Membership in Bituminous Coal Code; Form of Notice to Bituminous Coal Producers of District Board Organization; Form of Proxy for Organization Meeting of District Board; Form of Affidavit of Tonnage of Producers; General Order No. 4 of National Bituminous Coal Commission Providing for Provisional Approval of Marketing Agencies; General Order No. 5 of National Bituminous Coal Commission Designating the Employes' Member of the Respective District Board; General Order No. 6 of the National Bituminous Coal Commission Deferring the Filing of Reports by Producers; TD-4596, being regulations relating to the tax on the sale or other disposal of Bituminous Coal issued to Collectors of Internal Revenue, etc.; form No. 1 (coal) Treasury Department Internal Revenue Service of Producers Return to be used in reporting monthly sales; Form of Affidavit of Service of Notice or Organization Meeting of District Board; said exhibits being identified as Exhibits "C," "D," "E," "F," "G," "H," "I," "J" "K," "L," "M," "N," and "O" respectively, may be transmitted to the United States Circuit Court of Appeals for the Sixth Circuit on the appeal of this cause, without the necessity of copying same.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

John S. L. Yost,
Special Assistant Attorney General,
Bunk Gardner,
United States Attorney,
Oldham Clarke,
Assistant U. S. Attorney,
Attorneys for Defendant.

ORDER—Filed November 23, 1935.

The parties having stipulated that the charts and tables attached to and identified in the statements of Frederick C. Tryon, Charles O'Neill, H. L. Findlay, George W. Reed, Fred S. McConnell, Philip Murray, F. E. Berquist and Homer L. Morris, appearing in the record as the avowals of the said named parties; the contract between Hickman Williams & Company and Southern Extract Company, and accepted by Harlan-Wallins Coal Corporation, dated June 24, 1935, and the contract between Kerns Coal Company of Cincinnati and Ogelsby, Norton & Company as agent for the American Radiator Company, approved and accepted by the Harlan Collieries Company, dated April 29, 1935, said two contracts being filed with and attached to a stipulation filed herein as Exhibits "A" and "B" to such stipulation; and the following named exhibits filed in the record by stipulation of the parties made in open court, to-wit: General Order No. 1 of the National Bituminous Coal Commission; General Order No. 2 of the National Bituminous Coal Commission; General Order No. 3 of the National Bituminous Coal Commission; Form of Acceptance of Membership in Bituminous Coal Code; Form of Notice to Bituminous Coal Producers of District Board Organization; Form of Affidavit of Service of Notice of Organization Meeting of District Board; Form of Proxy for Organization Meeting of District Board; Form of Affidavit of Tonnage of Producers; General Order No. 4 of National Bituminous Coal Commission Providing for Provisional Approval of Marketing Agencies; General Order No. 5 of National Bituminous Coal Commission Designating the Employes' Member of the Respective District Board; General Order No. 6 of the National Bituminous Coal Commission Deferring the Filing of Reports by Producers; TD-4596, being regulations relating to the tax on the sale or other disposal of Bituminous Coal Issued to Collectors of Internal Revenue, etc.; Form No. 1 (coal) Treasury Department Internal Revenue Service of Producers' Return to be used in reporting monthly sales; said exhibits being identified as Exhibits "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," and "O," respectively, may be transmitted to the United States Circuit Court of Appeals for the Sixth Circuit as a part of the record without the necessity of copying; and the Court being advised,

Order

It Is Ordered that said charts and tables and said exhibits be transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Sixth Circuit, as a part of the record in this case, without the necessity of copying.

Elwood Hamilton,
U. S. District Judge.

PETITION FOR APPEAL—Filed November 23, 1935.

The plaintiffs, R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King Coal Company, P. V. & K. Coal Company, Mary Helen Coal Corporation, Green Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company, and Gatliff Coal Company, conceiving themselves aggrieved by the decree made and entered herein on the 14th day of November, 1935, in the above entitled cause, hereby appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and they pray that their appeal be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

R. C. Tway Coal Company, Et Al.,
Plaintiffs.
By Woodward, Dawson & Hobson,
Attorneys.

ASSIGNMENT OF ERRORS—Filed November 23, 1935.

Now comes the plaintiffs, R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Centract Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King Coal Company, P. V. & K. Coal Company, Mary Helen Coal Corporation, Green-Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, and make and file the following assignment of errors upon which they will rely upon their appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the decree entered herein on the 14th day of November, 1935:

1. The Court erred in holding that the Bituminous Coal Conservation Act of 1935 is constitutional, and a valid exercise of the power of Congress to regulate interstate commerce.

2. The Court erred in holding that said Act is not violative of the Fifth and Tenth Amendments to the Constitution of the United States.

3. The Court erred in holding that said Bituminous Coal Conservation Act does not improperly delegate legislative power.

4. The Court erred in holding that Sections 3 and 9 of the Act are a valid exercise of the power of Congress to impose penalties for the purpose of coercing compliance with the regulations of the Act dealing with interstate commerce.

5. The Court erred in holding that Sections 3 and 9 of the Act do not deprive the plaintiffs of their property without due process of law, in violation of the Fifth Amendment.

6. The Court erred in holding that Sections 3 and 9 of the Act do not violate the rights reserved to the respective States and to the people under the Tenth Amendment to the Constitution of the United States.

7. The Court erred in holding that plaintiffs are not entitled to the relief sought in their bill as amended, and in dismissing the action at the cost of the plaintiffs.

8. The Court erred in refusing to hold that the Act is an unconstitutional attempt on the part of Congress to regulate matters not within the competency of Congress.

9. The Court erred in refusing to hold that the Congress of the United States, under the Constitution, has

no jurisdiction over and no power to legislate upon the matters required by Section 4 of the Act to be embraced in the Bituminous Coal Code therein required to be formulated, and particularly in refusing to hold that the fixing of minimum and maximum prices of coal free on board transportation facilities at the mines, and the regulation and control of contracts for the sale of coal, are not within the competency of Congress under the Constitution.

10. The Court erred in refusing to hold that the regulation of the relations between producers of bituminous coal and their employees in the production of coal, including the regulation and fixing of wages and hours of service, as authorized in part III of Section 4 of the Act, are each and all matters not within the competency of Congress under the Constitution of the United States.

11. The Court erred in refusing to hold that the attempted regulation by Congress of the matters enumerated in the 9th and 10th assignment herein, and of the matters required by Section 4 of the Act to be embraced in the Bituminous Coal Code therein provided for, is violative of the due process clause of the Fifth Amendment to the Constitution of the United States, and of the reserved rights of the States and of the people, secured to them by the Tenth Amendment.

12. The Court erred in refusing to hold that Sections 3 and 9 of the Act, in so far as they purport to impose upon those producers of bituminous coal who refuse to accept and operate under Section 4 of the Act and of the Code formulated thereunder, a tax equal to fifteen per cent of the sale price at the mine of the coal produced by them, is not a good faith exercise of the taxing power conferred upon Congress by Clause 1, Section 8, Article 1 of the Constitution of the United States, but is an unconstitutional attempt on the part of Congress, under the guise of taxation, to punish those producers of coal who are unwilling to surrender their constitutional right to conduct their business free of unconstitutional interference and regulation by Congress and in refusing to hold that such penalties operate to deprive the plaintiffs of their property without due process of law, in violation of the Fifth Amendment, and is an unconstitutional invasion of the rights reserved to the plaintiffs by the Tenth Amendment to the Constitution of the United States.

13. The Court erred in refusing to hold that Sec-

tion 4 of the Act is an unconstitutional delegation of legislative power.

14. The Court erred in refusing to hold the Act unconstitutional in its entirety.

15. The Court erred in refusing to hold the Act invalid in its entirety, because of the inseparability of its provisions.

16. The Court erred in refusing to grant the plaintiffs the relief sought, and particularly in refusing to grant them a permanent injunction against the collection of the penalties or so-called taxes sought to be imposed upon them by Sections 3 and 9 of the Act for their failure to accept and operate under the Code provided for by Section 4 of the Act.

17. The Court erred in striking on its own motion the statement of Roy Carson.

18. The Court erred in overruling plaintiffs' motion to strike paragraph II of defendant's answer.

Wherefore, they pray that the said decree may be reversed, and that such [illegible] and further relief be given to them as to the Court may seem just and proper.

R. C. Tway Coal Company, Et Al.,
Plaintiffs,
By Woodward, Dawson & Hobson,
Attorneys.

ORDER—Filed November 23, 1935.

This day come the above named plaintiffs and tendered and offered to file their petition for appeal herein, together with their assignment of errors, which are ordered filed; and the Court having considered same,

It Is Ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the decree entered herein on the 14th day of November, 1935, be and the same is allowed, and a certified tran-

Order

script of the record herein is ordered forwarded to the United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati, Ohio.

It Is Ordered that the appeal bond herein be and the same is fixed at the sum of Five Hundred Dollars ($500.00).

Elwood Hamilton,
U. S. District Judge.

APPEAL BOND—Filed Nov. 23, 1935.

Know All Men By These Presents:

That R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Central Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King Coal Company, P. V. & K. Coal Company, Mary Helen Coal Corporation, Green-Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company, as principals, and R. C. Tway, as surety, are held and firmly bound unto Selden R. Glenn, individually and as Collector of Internal Revenue for the District of Kentucky, in the sum of Five Hundred ($500.00) Dollars to the payment of which they bind themselves and their successors firmly by these presents.

Signed and dated this 23 day of November, 1935.

Whereas, the above named principal hath prosecuted an appeal for the Sixth Circuit to reverse the order rendered in the above entitled suit by the District Court of the United States for the Western District of Kentucky, at Louisville—

Now Therefore, the condition of this obligation is such that if the above named principal shall prosecute its

said appeal to effect and answer all costs if it shall fail to make good its plea that this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

P. V. & K. Coal Company,
Mary Helen Coal Corp.,
Green-Silvers Coal Corp.,
Pioneer Coal Company,
Black Star Coal Company,
Gatliff Coal Company,
R. C. Tway Coal Company,
Kentucky Cardinal Coal Corporation,
Harlan-Wallins Coal Corporation,
Creech Coal Company,
Harlan Central Coal Company,
Harlan Fuel Company,
Crummies Creek Coal Company,
Three Point Coal Company,
Clover Fork Coal Company,
Harlan Collieries Company,
High Splint Coal Company,
Cornett-Lewis Coal Company,
Kentucky King Coal Company,

By Woodward, Dawson & Hobson,
Attorneys.

R. C. Tway,
Surety.

Approved Nov. 23, 1935:
Elwood Hamilton,
U. S. District Judge.

CITATION—Issued by Judge Hamilton, November 23, 1935.

To Selden R. Glenn, Individually, and as Collector of Internal Revenue for the District of Kentucky:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Sixth Circuit, in the City of Cincinnati, Ohio, thirty days from and after the date of this citation, pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the Western District of Kentucky, wherein R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, Creech Coal Company, Harlan Central Coal Coal Company, Harlan Fuel Company, Crummies Creek Coal Company, Three Point Coal Company, Clover Fork Coal Company, Harlan Collieries Company, High Splint Coal Company, Cornett-Lewis Coal Company, Kentucky King Coal Company, P. V. & K. Coal Company, Mary Helen Coal Corporation, Green-Silvers Coal Corporation, Pioneer Coal Company, Black Star Coal Company and Gatliff Coal Company are the appellants and you are the appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, this the 23 day of November, 1935.

Elwood Hamilton,
U. S. District Judge.

Service accepted this November 23, 1935.

Bunk Gardner,
United States Attorney,
Oldham Clarke,
Assistant U. S. Attorney,
Attorneys for Appellee.

STIPULATION SETTLING RECORD IN LIEU OF PRAECIPE—Filed Nov. 23, 1935.

It Is Stipulated by and between the undersigned attorneys for the plaintiffs and the defendant, respectively, that the following described pleadings, exhibits, orders, other papers, documents and statement of evidence shall be printed under the supervision of the office of Woodward, Dawson & Hobson, attorneys for the plaintiffs, and the District Attorney's office for the Western District of Kentucky, attorneys for the defendant, and included in the transcript of the record of this case for appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and shall constitute the record herein for the purposes of appeal, and that the Clerk of the United States District Court for the Western District of Kentucky may certify such printed transcript as the transcript of the record on appeal herein, and that if necessary or proper, the Court may enter an order authorizing the Clerk to so certify the same without further notice, and that this stipulation shall be printed as a part of said record, to-wit:

1. Style of this case in appellate court and index.
2. This stipulation.
3. Original bill in equity.
4. Amended bill filed October 21, 1935.
5. Order filing same.
6. Amended bill filed November 1, 1935.
7. Order of November 1, 1935, filing amended bill and controverting same and amended bill filed October 21, 1935 of record.
8. Answer.
9. Order filing answer.
10. Petition of Pioneer Coal Company and Black Star Coal Company to be made parties plaintiff.
11. Order filing petition of Pioneer Coal Company and Black Star Coal Company to be made parties plaintiff, and making them parties plaintiff.
12. Petition of Gatliff Coal Company to be made a party plaintiff.
13. Order filing petition of Gatliff Coal Company to be made a party plaintiff, and making it a party plaintiff.
14. Motion to strike Paragraph II of answer.
15. Stipulation that statements attached thereto and exhibits referred to in said statements may be offered as evidence, subject to objection of the parties for want of relevancy and materiality. (The attached statements

Stipulation Settling Record in Lieu of Praecipe

and exhibits referred to are not to be copied at this point, but only the stipulation with reference thereto.)

16. Defendant's objection to and motion to strike as evidence plaintiffs' statements attached to stipulation above referred to.

17. Plaintiffs' objection to and motion to strike defendant's evidence and exhibits attached to such stipulation.

18. Order filing stipulation and objections to the statements attached thereto; motions to strike same and rulings on such objections and motions; overruling plaintiffs' motion to strike paragraph II of defendant's answer, and finally submitting the case.

19. Stipulation filing typical contracts. (Copy stipulation, but not contracts.)

20. Statement of evidence.

21. Opinion of the Court.

22. Decree.

23. Finding of facts.

24. Stipulation for transmission of certain original papers to the United States Circuit Court of Appeals as part of the appeal record without copying.

25. Order authorizing transmission of such original papers.

26. Petition for appeal.

27. Assignment of errors.

28. Order allowing appeal.

29. Appeal bond and order approving same.

30. Citation, including acceptance of service.

31. Stipulation of counsel settling record.

32. Clerk's certificate to transcript of record.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

John S. L. Yost,
Special Assistant Attorney General,
Bunk Gardner,
United States Attorney,
Oldham Clarke,
Assistant U. S. Attorney,
Attorneys for Defendants.

STIPULATION—Filed December 6, 1935.

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record in the above entitled cause, as agreed upon by the parties for the purposes of appeal herein, and the Clerk may so certify.

Woodward, Dawson & Hobson,
Attorneys for Plaintiffs.

Bunk Gardner,
United States Attorney,
Oldham Clarke,
Assistant U. S. Attorney,
Attorneys for Defendant.

CLERK'S CERTIFICATE.

I, Lilburn Phelps, Clerk of the United States District Court for the Western District of Kentucky, do certify that the foregoing is a correct transcript of the record in this court in the above entitled cause, as agreed upon by the parties for the purposes of appeal.

In Witness Whereof, I have caused the seal of said court to be hereunto affixed, this the 10th day of December, 1935.

Lilburn Phelps,
Clerk, U. S. District Court,
Western District of Kentucky.

(Seal)

[fol. 229] UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the printed transcript of record in the case of R. C. Tway Coal Company, et al., vs. Selden R. Glenn, Individually and as Collector of Internal Revenue for the District of Kentucky, No. 7283, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

I further certify that this cause is now pending, that it has not been heard by this Court, and it is awaiting a date for argument and presentation to this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 17th day of December, A. D. 1935.

J. W. Menzies, Clerk, U. S. Circuit Ct. of Appeals for the Sixth Circuit. (Seal United States Circuit Court of Appeals, Sixth Circuit.)

[fol. 230] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 23, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.